© CANADA DEPARTMENT OF JUSTICE, 2000 PERMISSION TO REPRODUCE GRANTED TO HER MAJESTY IN RIGHT OF CANADA, AS REPRESENTED BY THE DEPARTMENT OF JUSTICE, ON 3RD. OF DECEMBER, 1996. ALTHOUGH EVERY EFFORT HAS BEEN MADE TO ENSURE THE ACCURACY OF ITS CONTENTS, THE DEPARTMENT OF JUSTICE ASSUMES NO RESPONSIBILITY FOR THE ACCURACY OR RELIABILITY OF THE INFORMATION CONTAINED HEREIN.

REPRODUCTION IN WHOLE OR IN PART THROUGH MICROMEDIA IS PERMITTED, SUBJECT TO THE FOLLOWING RESTRICTIONS. TRANSLATIONS AND MODIFICATIONS ARE NOT PERMITTED.

ALTHOUGH EVERY EFFORT HAS BEEN MADE TO ENSURE THE ACCURACY OF ITS CONTENTS, NO REPRODUCTION BY MICROMEDIA SHALL SUGGEST THAT THE MINISTER OF JUSTICE ASSUMES ANY LIABILITY FOR THE ACCURACY OR RELIABILITY OF THE INFORMATION CONTAINED HEREIN.

micromedia
a division of IHS Canada

20 Victoria Street
Toronto, Ontario M5C 2N8
Tel.: (416) 362-5211
Toll Free: 1-800-387-2689
Fax: (416) 362-6161
Email: info@micromedia.on.ca

DIVISION OF POWERS AND JURISDICTIONAL ISSUES RELATING TO MARRIAGE

By: EGALE Canada

Per: John Fisher, Executive Director
Prof. Kathy Lahey, Board Member
Laurie Arron, Vice-President

June 2000

This paper was prepared for the Law Commission of Canada under the title *"Division of Powers and Jurisdictional Issues Relating to Marriage"*. The views expressed are those of the authors and do not necessarily reflect the views of the Commission. The accuracy of the information contained in the paper is the sole responsibility of the authors.

Ce document est également disponible en francais sous le titre « *Le partage des pouvoirs et l'analyse des compétences en matière de mariage* ».

11

SUMMARY

The purpose of this paper is to examine the constitutional division of powers and jurisdictional issues relating to marriage, with a particular focus on which aspects of marriage may be addressed by each level of government. Governments and Courts alike have affirmed society's developing understanding of the diversity of family relationships, and laws are increasingly being fashioned to modernize the basis on which social benefits and obligations are allocated.

The paper begins by setting out the various constitutional principles relevant to a division of powers analysis. It then examines judicial decisions which have assessed the scope of the federal power over "marriage and divorce" pursuant to s. 91(26) of the *Constitution Act, 1867*, as well as the provincial power over the "solemnization of marriage", pursuant to s. 92(12) of the *Constitution Act*. Although the federal government has exclusive jurisdiction over capacity to marry, courts have on occasion upheld the constitutional validity of provincial enactments dealing with issues such as age and consanguinity, which appear to relate more to capacity than to solemnization. Those cases that appear to recognize provincial competence on matters relevant to capacity are all careful, however, to justify the exercise of provincial power as primarily procedural. Where inconsistency with federal restrictions on a capacity issue arises, the provincial enactment has been held invalid.

The application of these principles to marriage for same-sex couples is then considered. There are few federal statutes dealing with capacity. Parliament has legislated the prohibited degrees of consanguinity and criminalized polygamy, but has only expressed its view in non-binding resolutions or interpretative clauses that marriage is restricted to opposite-sex couples only.

In the absence of express federal legislation, additional requirements may be derived from federal common law, which has been held by Canadian Courts to be the source of the prohibition on marriage for same-sex couples. Common law is subject to further development by the Courts, however, and the paper emphasizes the changing nature of marriage, as well as decisions which underline the importance of interpreting and applying the common law in conformity with the *Charter of Rights*.

The paper then considers the constitutional validity under a division of powers analysis of provincial laws which purport to restrict marriage to opposite-sex couples only. In addition to the explicit restrictions found in Quebec and Alberta, the marriage legislation of some jurisdictions uses "gendered" language implicitly suggesting a restriction on marriage to opposite-sex couples only, while other more "permissive" provinces use gender-neutral language, so that there would be no provincial barrier to the solemnization of a marriage if federal common law is interpreted to permit same-sex couples to marry.

The report concludes with a consideration of recent legislative changes and further options for law reform. Although many of the rights and responsibilities of marriage are being extended to same-sex couples, equality of status has not yet been recognized. Under a division of powers analysis, governments are able to amend specific laws within their fields of legislative competence to treat same-sex couples equally. More comprehensive alternative schemes may, however, be subject to constitutional challenge. Similarly, attempts by some provinces to prohibit same-sex couples from marrying will inevitably be considered unconstitutional as an attempt to usurp federal jurisdiction over capacity to marry.

Court cases by same-sex couples seeking to obtain a marriage licence are moving forward in Ontario, Quebec and British Columbia, and the government of British Columbia has recently

expressed its support for equal marriage rights for same-sex couples. The enactment of federal legislation to explicitly permit same-sex couples to marry remains the most straightforward means of providing equality.

BIOGRAPHY

EGALE was founded in 1986 to advance equality for Canadian lesbians, gays and bisexuals at the federal level. EGALE's work is comprised of three equal components: political action, legal interventions and public education. With members in every province and territory, EGALE is Canada's only national lesbian, gay and bisexual equality rights organization.

EGALE has appeared before numerous Parliamentary and Senate Committees to address issues such as new reproductive technologies, hate crimes, social security reform, protection from discrimination, same-sex relationship recognition, income tax review, custody rights, immigration and many other current social issues of relevance to lesbians, gays and bisexuals.

EGALE has also been granted intervenor status in the leading equality cases of *Mossop v. Canada*, *Egan and Nesbit v. Canada*, *Vriend v. Alberta*, *M. v. H. and Ontario*, *Rosenberg & CUPE v. Canada*, *Little Sisters v. Canada Customs*, and *Chamberlain et al v. Board of Trustees of School District #36 (Surrey)*.

EGALE has prepared a number of Court Challenges Program Case Development Reports, has written a legal analysis of the impact of the decision of the Supreme Court in *Egan v. Canada*, has been commissioned to write a similar analysis of the impact of the decision of the Supreme Court in *Vriend v. Alberta*, develops Fact Sheets on current issues affecting the lesbian, gay and bisexual communities, maintains a Website (www.egale.ca) and two e-mail discussion groups to help keep our communities informed across the country, has participated in seminars on lesbian and gay equality issues, has participated in a numerous public education programs, and has undertaken many individual human rights projects.

EGALE has represented Canadian gays and lesbians at international conferences, including the United Nations World Conference on Human Rights in Vienna, the International Year of the Family Conference in Montreal, the World Conference on Women in Beijing, and the Beijing +5 Conference in New York.

EGALE has a number of active Committees, including a Research Committee, consisting of members of the Board of Directors with significant research and academic qualifications. Members of EGALE's Executive have testified as witnesses before the Canadian Human Rights Tribunal, and EGALE's Executive Director John Fisher also teaches courses at the Universities of Ottawa and Carleton on *Lesbian and Gay Legal Issues.* Professor Lahey teaches at Queen's University, and has recently published a major interdisciplinary study on law and sexuality, entitled "*Are we "Persons" Yet? Law and Sexuality in Canada*".

ACKNOWLEDGEMENTS

The research contributions of the following are gratefully acknowledged:

Wendy Adams

Michael Bertrand

Jennifer Cunningham

Kerri Fisher

Kevin Preston

Tracey Pybus

TABLE OF CONTENTS

SUMMARY iii

BIOGRAPHY vii

ACKNOWLEDGEMENTS ix

PART ONE: INTRODUCTION 1

PART TWO: CONSTITUTIONAL DIVISION OF POWERS 3

I. Constitutional Principles 4

A. Identifying the Pith and Substance of a Law 4

1. Pith and Substance Generally 4

2. Double Aspect Principle 7

B. Assigning the Pith and Substance to a Head of Legislative Power 8

1. Exclusivity 8

2. Ancillary Power / Necessarily Incidental Doctrine 9

C. Paramountcy 10

D. Some Specific Issues Relevant to Division of Powers Over Marriage 11

1. The Effect of Parliamentary Silence on the Scope of Provincial Powers 11

2. Application of the Doctrine of Paramountcy to Federal Common Law 13

E. Reading Down, Severance and Invalidity 14

II. Scope of Powers Relating to Marriage 15

A. Federal Jurisdiction 16

B. Provincial Jurisdiction 18

1. Procedural matters 19

(a) Issuing licences 19

(b) Who can perform the marriage ceremony 19

2. Gender 20

3. Age 20

(a) Minors 21

(b) Parental consent 23

4. Consanguinity 25
(a) General restrictions 25
(b) Adopted persons 28
5. Divorce 29
6. Validity of marriages 30
C. Conclusions 31
1. Matters relating *prima facie* to capacity 31
2. Matters relating *prima facie* to solemnization 32
PART THREE: MARRIAGE OF SAME-SEX COUPLES 33
I. INTRODUCTION 33
II. SOURCE OF PROHIBITION ON MARRIAGE OF SAME-SEX COUPLES 34
A. Federal 34
1. Statutes 34
2. Common law 39
(a) Is there a common law prohibition? 39
(b) Critiques of *Hyde and Corbett* 41
(c) Development of the common law 45
(d) Procreation and consummation 47
(e) The changing nature of marriage 49
B. Constitutionality of Provincial Restrictions on Marriage for Same-sex Couples 53
1. Introduction 53
2. Categories of provincial law 54
(a) Laws that are gender-neutral or contain no restrictions on marriage for same-sex couples 54
(b) Laws that reference or link with federal requirements 55
(c) Laws that contain gendered language that implicity restricts marriage to opposite-sex couples 57
(d) Laws that maintain explicit prohibitions on marriage for same-sex couples 58
(e) Laws that maintain explicit prohibitions on marriage for same-sex couples, and also invoke the constitutional "notwithstanding" clause in an effort to bar judicial scrutiny of the legislation's constitutionality. 60
PART FOUR: OPTIONS FOR REFORM 63
I. Status vs Incidents of Marriage 63
II. Extending the Incidents of Marriage 64
A. The Federal Approach 65
1. Bill C-78: Same-sex Survivor Benefits 65
2. Bill C-23: Modernizing Benefits and Obligations 65

B. The Quebec Approach 67
1. Bill 32 67
C. The Ontario Approach 68
1. Bill 5 68
D. The British Columbia Approach 69
E. Registered Domestic Partnerships 71
III. Extending the Status of Marriage 73
IV. Jurisdictional Issues Relating to Law Reform Options 76

PART FIVE: CONCLUSIONS 81

BIBLIOGRAPHY 83

PART ONE

INTRODUCTION

Marriage has long been recognized as a fundamental institution in Canadian society, and its importance to Canadians is underscored by its explicit recognition in the Constitution. At the same time, the institution has proven itself flexible in adapting to the needs of equality, so that a woman's legal personhood, for example, is no longer subsumed into the identity of her husband upon marriage.

One way in which being legally married differs from common-law status is that the former is positively chosen by the parties, whereas the latter is imposed by law. This difference has several effects. Marriage affirms the choice to make a long-term commitment in a way that an imposed regime cannot. It also allows the parties to choose married status when status as a common-law cohabitant is not available, for example, when the parties live in different countries or when the length of the relationship is less than the common-law requirement.

There has also been increasing recognition in recent years that families come in many different forms, and their needs are not necessarily contingent upon the marital status of the family-members. Canadian courts have similarly been sending clear messages that government legislation may not discriminate on grounds such as family status, marital status or sexual orientation, requiring governments to ensure that marriage is not used as a means of excluding or marginalizing other kinds of relationships with similar needs.

As a result of these developments, both federal and provincial governments are exploring a variety of law reform options for recognizing diverse family forms. The constitutional division of powers issues relating to marriage are becoming increasingly relevant since policy-makers must inevitably decide what options are constitutionally available to each level of government.

The purpose of this paper is to examine the constitutional division of powers and jurisdictional issues relating to marriage, with a particular focus on which aspects of marriage may be addressed by each level of government. The application of these principles to marriage for same-sex couples[1] will then be specifically considered, since this is a topical area in which both the federal government and certain provincial governments are simultaneously asserting jurisdiction to legislate. A legal challenge currently before the Quebec courts will also require the courts to consider the extent to which each of the federal and provincial governments has jurisdiction to restrict capacity to marry to opposite-sex couples only.

[1] Throughout this paper, the term "same-sex marriage" is not used because it suggests that "marriage" in its unqualified sense inherently excludes same-sex couples, a conception which is challenged in Part Three, Section II of this paper.

PART TWO

CONSTITUTIONAL DIVISION OF POWERS

This section examines the division of legislative authority over marriage and divorce. The general constitutional principles relating to division of powers will first be set out, since these provide the necessary framework for the specific consideration of the legislation and case law relating to the scope of federal and provincial authority over different aspects of marriage. The emphasis will be placed on case law, which has played the greatest role in defining the scope of federal and provincial authority over marriage.

The starting point for any discussion of division of powers is, of course, ss. 91 and 92 of the *Constitution Act, 1867*.[2] Under the Constitution, matters which fall within one of the heads of legislative authority listed in s. 91 are within the exclusive jurisdiction of Parliament; matters which fall within one of the heads of legislative authority listed in s. 92 are within the exclusive jurisdiction of the provincial legislatures.

Sections 91 and 92 explicitly set out the jurisdictional competence of the federal and provincial governments to address issues relating to marriage and divorce, as follows:

- s. 91(26): Parliament has jurisdiction over "marriage and divorce";
- s. 92(12): Provincial legislatures have authority to enact laws in respect of the "solemnization of marriage";
- s. 92(13): Provincial legislatures have authority to enact laws in respect of "property and civil rights", which include support, adoption and most matters of family law.

---

[2] *Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3 [hereafter "the *Constitution Act, 1867*"]

I. Constitutional Principles

While ss. 91 and 92 provide that legislative authority in relation to marriage is divided between Parliament and the provincial Legislatures, determining which specific issues fall within the federal jurisdiction over "marriage" and which fall within provincial jurisdiction over the "solemnization of marriage" is less clear-cut. Before considering the specific jurisdictional issues surrounding marriage, it is necessary to first examine the relevant constitutional principles.

Determining whether a particular law properly falls within the constitutional authority of the enacting legislative body is essentially a two-step process: first, the pith and substance (or matter) of a law must be identified; and second, the pith and substance must be assigned to one of the heads of legislative power specified in the Constitution.

A. Identifying the Pith and Substance of a Law

1. Pith and Substance Generally

The "pith and substance" of a law is its most important or dominant feature. It has been noted that "the identification of the [pith and substance] of a statute will often effectively settle the question of its validity, leaving the allocation of the matter to a class of subject little more than a formality."[3]

---

[3] P.W. Hogg, *Constitutional Law of Canada (1998 Student Edition)* (Toronto: Carswell, 1998) at 343 [hereafter "Hogg"].

Courts will consider a variety of factors to identify the pith and substance of a law, including the purpose of the legislation, its effect and the doctrine of 'colourability', which arises when "a statute bears the formal trappings of a matter within jurisdiction, but in reality is addressed to a matter outside jurisdiction."[4]

The pith and substance doctrine was developed in *Union Colliery Co. of British Columbia* v. *Bryden*,[5] and has been further explained in subsequent cases. In *Whitbread* v. *Walley*,[6] the Supreme Court of Canada held that impugned provisions of the *Canada Shipping Act* that limited the tortious liability of owners and operators of vessels were in pith and substance within the ambit of the federal power over navigation and shipping, rather than within the ambit of provincial jurisdiction over property and civil rights. In considering the scope of the "pith and substance" doctrine, the Court commented:

> There is, of course, no magic in the phrase. It simply signifies what has long been recognized as the first step in division of powers analysis, that the 'matter' of the impugned law must be identified. In this respect, the idea conveyed by the phrase 'pith and substance' can be expressed in many different ways. It can be described as the 'constitutional value represented by the challenged law', as 'an abstract of the statute's content', and as the 'true meaning of the challenged law' or the 'leading feature' or 'true nature and character' of the impugned law.[7]

In *R.* v. *Morgentaler*,[8] the Supreme Court of Canada considered the range of factors and materials that may be examined in identifying the pith and substance of a law. The case concerned the constitutionality of two Nova Scotia statutes that prohibited the performance of abortions outside hospitals and denied health insurance coverage for abortions performed in violation of the prohibition. The Supreme Court of Canada held that the two statues were *ultra*

---

[4] *Ibid.* at 352.

[5] [1899] A.C. 580 (P.C.).

[6] [1990] 3 S.C.R. 1273.

[7] *Ibid.* at 1286.

[8] [1993] 3 S.C.R. 463.

vires the province of Nova Scotia, because they were in pith and substance criminal law, a matter of federal jurisdiction under s. 91(27) of the *Constitution Act, 1867*. The Court based its decision on the following factors:

- abortion was historically considered to be part of criminal law;
- the effect, history, purpose and circumstances surrounding the enactment of the statutes showed a central purpose to restrict abortion;
- the effect of the legislation was the same as the defunct abortion provision in the *Criminal Code*, and the overlap of effects was capable of supporting an inference that the legislation was designed to serve a criminal law purpose;
- Hansard evidence demonstrated an opposition to free-standing abortion clinics per se; and
- there was no evidence in the legislative proceedings of the claimed purpose to prevent a two-tiered medical system.

In reaching its decision, the Court stated:

> There is no single test for a law's pith and substance. The approach must be flexible and a technical, formalistic approach is to be avoided. ... While both the purpose and effect of the law are relevant considerations in the process of characterization ... it is often the case that the legislation's dominant purpose or aim is the key to constitutional validity.[9]

The Court noted that the pith and substance analysis is not "restricted to the four corners of the legislation", and can take into account social or economic purposes, the circumstances surrounding the enactment of a law, and the actual or predicted practical effect of the law in operation:

> In determining the background, context and purpose of challenged legislation, the court is entitled to refer to extrinsic evidence of various kinds provided it is relevant and not inherently unreliable. ... This clearly includes related legislation ... and evidence of the 'mischief' at which the legislation is directed. ... It also includes legislative history, in the sense of the events that occurred during drafting and enactment ... .[10]

---

[9] *Ibid.* at para. 24.

[10] *Ibid.* at paras. 26-27.

2. Double Aspect Principal

It may not be possible to identify the pith and substance of a law as a singular matter. Some laws will have two matters: one that comes under one head of power, and one that comes under another. This was noted in *Hodge* v. *The Queen*:

> [S]ubjects which in one aspect and for one purpose fall within s. 92, may in another aspect and for another purpose fall within s. 91.[11]

In such a case, the double aspect principle is applied. According to Hogg, the double aspect principle has the following effect:

> [W]hen the court finds that the federal and provincial characteristics of a law are roughly equal in importance, then the conclusion is that laws of that kind may be enacted by either the Parliament or a Legislature.[12]

As a result, the double aspect principle is one way to uphold the validity of a law. An application of the double aspect principle is provided by *Multiple Access* v. *McCutcheon*,[13] in which both a provincial and federal law, each creating a civil remedy for insider trading, were upheld as constitutionally valid.

Where two separate statutes are validly enacted by each of Parliament and a provincial Legislature, conflicts between the two laws are resolved in favour of the federal law, which is considered paramount.[14]

---

[11] [1883] 9 A.C. 117 at 130 (P.C.).

[12] *Supra* note 3 at 347.

[13] [1982] 2 S.C.R. 161.

[14] See discussion on doctrine of paramountcy in Part Two, Section I.C, *infra*.

B. Assigning the Pith and Substance to a Head of Legislative Power

At the second step in the constitutional analysis, the matter or pith and substance of a law is assigned to a particular class of subjects in either ss. 91 or 92 of the *Constitution Act, 1867*. As noted above,[15] this is often a formality. If the matter is assigned to a class of subjects over which the enacting body has jurisdiction, the law is valid; otherwise, it will be invalid. Two concepts relevant at this stage of the analysis are exclusivity, and the ancillary powers doctrine.

1. Exclusivity

The exclusive authority of Parliament and the Legislatures over matters within their jurisdiction derives from the introductory words to each of ss. 91 and 92 of the *Constitution Act, 1867*. Hogg notes that "each list of classes of subjects in s. 91 or s. 92 of the *Constitution Act, 1867* is exclusive to the Parliament or Legislature to which it is assigned. This means that a single matter will come within a class of subjects in only *one* list."[16] In other words, the classes of subjects do not duplicate or overlap with each other - a matter falls within the ambit of either one or the other. Thus, a single matter may be ascribed to only one of the classes of subjects in either s. 91 or s. 92 of the *Constitution Act, 1867*. Under the double aspect principle, discussed above,[17] the pith and substance of a law may deal with two matters of approximately equal importance, enabling a law to be validly enacted by either level of government. The different heads of power themselves, however, remain mutually exclusive.

---

[15] *Supra* note 3.

[16] *Ibid.* at 370.

[17] Part Two, Section I.A.2, *supra*.

When one head of power *seems* to overlap with another head of power, courts have interpreted the narrower head to limit the scope of the broader head. This is particularly relevant in the context of marriage, where the federal jurisdiction over "marriage" would, on its face, appear broad enough to cover issues relating to the solemnization of marriage, which is a matter of provincial jurisdiction. As a result of the application of the doctrine of exclusivity, the more specific provincial power over the solemnization of marriage has been interpreted to limit the apparently broad federal power over "marriage and divorce", thus eliminating the apparent overlap between the federal and provincial jurisdictions.[18]

2. Ancillary Power / Necessarily Incidental Doctrine

Once the pith and substance of a law is identified, and it has been assigned to a head of power of the enacting body (thus making the law *intra vires*), it can incidentally encroach upon the jurisdiction of another legislative body. For instance, an isolated provision can encroach when the rest of the legislative scheme is valid. Hogg notes that "the pith and substance doctrine enables a law that is classified as 'in relation to' a matter within the competence of the enacting body to have incidental or ancillary effects on matters outside the competence of the enacting body."[19] Thus, an isolated provision that appears to go beyond an enacting government's jurisdiction may be upheld as part of a larger, constitutionally valid scheme.

According to *General Motors* v. *City National Leasing*,[20] for such incidental effects to be permitted, the legislative scheme must be constitutionally valid as a whole and the

---

[18] *Re the Marriage Law of Canada*, [1912] A.C. 880 (P.C.) [hereafter "*Re the Marriage Law of Canada*"].

[19] *Supra* note 3 at 372.

[20] [1989] 1 S.C.R. 641.

encroachment must be *rationally connected* to the intent of the scheme (though if the encroachment is major, it may have to be 'truly necessary' or 'essential' to the scheme).[21]

C. Paramountcy

Because of the double aspect principle and the ancillary power doctrine, there is a possibility for inconsistency between otherwise valid federal and provincial laws. In such cases, it is the federal law that prevails, by virtue of the doctrine of paramountcy. As Hogg explains:

> The doctrine of paramountcy stipulates that, where there are inconsistent federal and provincial laws, it is the federal law that prevails; paramountcy renders the provincial law inoperative to the extent of the inconsistency. Thus, paramountcy is a form of attack that is available only against a provincial law, and then only where there is a conflicting federal law in existence.[22]

The key to paramountcy is that it comes into play after the validity of both of the laws in apparent conflict has been established. In this respect, paramountcy only applies "where there is a federal law and a provincial law which are (1) each valid, and (2) inconsistent."[23]

Determining whether two laws are inconsistent can be a difficult exercise. In the oft-cited case of *Smith* v. *The Queen*,[24] the test used by the Supreme Court of Canada for inconsistency is "express contradiction", or impossibility of dual compliance: "compliance with one law involves breach of the other."[25]

---

[21] *Ibid.* at 668-671. For a recent application of these requirements, see *Re Goods and Services Tax*, [1992] 2 S.C.R. 445.

[22] *Supra* note 3 at 362.

[23] *Ibid.* at 385.

[24] [1960] S.C.R. 776.

[25] *Ibid.* at 800. See also *Multiple Access Ltd.* v. *McCutcheon, supra* note 13 at 191.

Although other cases have expressed the test in slightly different terms,[26] it is clear that the test for inconsistency is difficult to meet. For instance, in a number of recent cases, courts found no inconsistency between a provincially granted licence and a municipal provision prohibiting the intended use of the licence.[27] Courts have also found no inconsistency where a provincial provision simply imposes a more stringent standard than a federal provision.[28] Hence, apparent conflict may not always be enough to invoke the paramountcy doctrine.

D. Some Specific Issues Relevant to Division of Powers Over Marriage

1. The Effect of Parliamentary Silence on the Scope of Provincial Powers

While the provinces have each enacted laws dealing with the requirements for the solemnization of marriage, Parliament has not been active in legislating the various components of capacity to marry. As will be further examined in Section II.B *infra*, in the absence of express federal enactment, a number of provincial Legislatures have purported to address matters such as age and consanguinity, which appear to be more related to capacity to marry than to the form or solemnization of marriage. Much of the case law in this area deals with the question of the extent to which provincial enactments are constitutional in the absence of federal legislation addressing issues of capacity.

---

[26] See, for example, *Bank of Montreal* v. *Hall*, [1990] 1 S.C.R. 121 at 154; *M & D Farm Ltd.* v. *Manitoba Agricultural Credit Corp.* [1999] 2 S.C.R. 961 at para. 41.

[27] See *Meadow Creek Farms Ltd.* v. *Surrey* (1978), 89 D.L.R. (3d) 47 (B.C.C.A.); *Propane Gas Association of Canada* v. *North Vancouver* (1989), 42 M.P.L.R. 29 (B.C.S.C.); *Great Canadian Casino Co. Ltd.* v. *Surrey (City)*, [1999] 3 W.W.R. 13 (B.C.S.C.).

[28] See *Ross* v. *Registrar of Motor Vehicles*, [1975] 1 S.C.R. 5; *Construction Montcalm* v. *Minimum Wage Commission*, [1979] 1 S.C.R. 754.

In theory, silence or a failure to legislate on the part of Parliament should have no effect on provincial powers. This flows from the doctrine of exclusivity – since Parliament or the provincial Legislatures each have exclusive competence over those areas ascribed to them under the Constitution, it follows that the jurisdiction of one level of government cannot be expanded by the failure of the other to legislate. This was established in the case of *Union Colliery*:

> ...the abstinence of the Dominion Parliament from legislating to the full limit of its powers could not have the effect of transferring to any provincial legislature the legislative power which had been assigned to the Dominion by s. 91 of the *Act of 1867*.[29]

Union Colliery was affirmed in *Natural Parents* v. *British Columbia (Superintendent of Child Welfare)*[30] and *Reference re Constitution Act (U.K.), ss. 91, 92*.[31] More recently, in *R.* v. *Lenart*, the Ontario Court of Appeal stated:

> Courts do not generally, as a matter of course, expand the competence of a provincial legislature to compensate for parliamentary inactivity. Simply because a result would be desirable is unsatisfactory support for the proposition that a provincial authority may create laws that relate to that matter, notwithstanding that the matter is outside of the enumerated matters of provincial competence. A threshold determination for a court is whether the provincial legislature is authorized to act under the law. The exclusivity doctrine provides that lists of classes of subjects under s. 91 or s. 92 of the *Constitution Act, 1867*, are exclusive to the Parliament or provincial legislature to which they are assigned. Professor Hogg notes that ancillary to this doctrine is the notion that if the Parliament or legislature fails to legislate on a matter, this does not augment the powers of the other... .[32]

Notwithstanding this clear position in principle, it appears that *in practice*, silence on the part of Parliament seems to have had some effect on the scope of provincial powers, both directly and indirectly. For one thing, as noted in *Lenart*, silence on the part of Parliament reduces the possibility of applying the paramountcy doctrine (which gives federal legislation priority over

---

[29] *Supra* note 5 at 588.

[30] [1976] 2 S.C.R. 751 at 759.

[31] [1991] 4 W.W.R. 193 at 203.

[32] (1998), 39 O.R. (3d) 55 at 66 [hereafter "*Lenart*"].

valid but conflicting provincial legislation), although a failure by Parliament to legislate may still leave open the application of the paramountcy doctrine to federal common law, as further discussed below. For another thing, there is some suggestion that a *deliberate exclusion* on the part of Parliament (such as the explicit exclusion of insurance companies from the scope of federal banking laws), can have the effect of expanding a province's jurisdiction, even if the excluded matter is within federal jurisdiction: see *Canadian Pioneer Management Ltd.* v. *Saskatchewan (Labour Relations Board).*[33] Finally, in some circumstances courts appear to have simply ignored *Union Colliery* and considered Parliament's silence as one factor that supports the constitutionality of provincial legislation. In one such case, for example, Laskin C.J., on behalf of the Supreme Court of Canada, stated:

> Unexercised federal authority may give leeway to the exercise of provincial authority in relation to local works and undertakings, and that is how I assess the situation here.[34]

2. Application of the Doctrine of Paramountcy to Federal Common Law

A further question arises from Parliament's failure to legislate on a number of issues related to capacity to marry. In the absence of federal legislation, many aspects of capacity to marry are derived from federal common law. Although it is clear that, under the doctrine of paramountcy, federal law prevails in the event of an inconsistency between federal and provincial legislation, the question remains whether federal common law prevails over a provincial statute. The Supreme Court of Canada seems to have answered this question in the affirmative. In *Bisaillon* v. *Keable*, Beetz J. for the majority noted the following:

---

[33] [1980] 1 S.C.R. 433 at 469. The Court noted that "[l]egislative jurisdiction involves certain powers of definition which are not unlimited but which, depending on the particular manner in which they are exercised, may affect other jurisdictional fields."

[34] *Fulton* v. *Alberta (Energy Resources Conservation Board)*, [1981] 1 S.C.R. 153 at 162; applied in *Windermere Watersport Inc.* v. *Invermere (District)* [1989] B.C.J. no. 863 (C.A.) online: QL (CJ).

> To the best of my recollection, I recall no case where the non-legislative 'federal law' has been given paramountcy over provincial laws. However, I do not see why the federal Parliament is under an obligation to codify legal rules if it wishes to ensure that they have paramountcy over provincial laws, at least when some of those legal rules fall under its exclusive jurisdiction, as for example do rules of evidence in criminal proceedings.[35]

This was reiterated in *Communications & Electrical Workers of Canada* v. *Canada (AG)* as follows:

> Existing and applicable law of Canada is not only statute law but also a body of federal, public common law as is clearly indicated in *Bisaillon* v. *Keable*. ... Indeed, the *Bisaillon* case teaches that federal common law may even enjoy the constitutional paramountcy which is usually thought of in terms of federal statutory law.[36]

Bisaillon v. *Keable* was also cited with approval in the dissenting opinion in *Delgamuukw* v. *British Columbia*.[37] Although Hogg questions these decisions,[38] existing case law favours the view articulated in *Bisaillon* v. *Keable* that federal law is paramount over inconsistent provincial law, regardless of whether the federal law is sourced in statute or common law.

E. Reading Down, Severance and Invalidity

When certain provisions of a law seem to go beyond the enacting body's jurisdiction, a court has a number of options – it may cure the apparent defect by "reading down" the impugned provisions, it may sever and declare unconstitutional the impugned provisions while retaining the constitutionality of the remainder of the legislation, or it may declare the law as a whole invalid.

---

[35] [1983] 2 S.C.R. 60 at 108.

[36] [1988] F.C.J. No. 319 online: QL (CJ) at 9.

[37] (1993), 104 D.L.R. (4th) 470 at 684 (B.C.C.A.).

[38] *Supra* note 3 at 384: "Paramountcy is a quality inherent in federal legislative power, and should in my view be attributed only to statutes enacted by the federal Parliament (and to regulations or orders made thereunder)."

As Hogg notes, "reading down" is simply a canon of interpretation, which is "only available where the language of the statute will bear the (valid) limited meaning as well as the (invalid) extended meaning; it then stipulates that the limited meaning be selected."[39] Reading down is related to a presumption of constitutionality: legislating bodies are presumed to have intended to act within their jurisdiction, and Courts will sometimes strain to so construe a statute, to avoid the necessity of striking it down.

Severance is similar to reading down, in that it enables the apparent excess of jurisdiction to be cured while retaining the constitutionality of what remains, but severance goes beyond mere statutory interpretation by holding part of a statute to be constitutionally invalid.

Severance is rarely granted, and has been held to be inappropriate when the remaining provisions are "so inextricably bound up with the part declared invalid that what remains cannot independently survive".[40] More commonly, the courts have tended to view statutes as forming a single interdependent legislative scheme. In circumstances where the pith and substance of the statute relates to matters outside jurisdiction, the statute as a whole will be struck down.

II. Scope of Powers Relating to Marriage

The cases examined in this section underscore that the scope of the jurisdiction accorded to each of the levels of government under the *Constitution Act* provides Parliament with exclusive

---

[39] *Ibid.* at 359-360.

[40] *A.-G. Alta.* v. *A.-G. Can. (Alta. Bill of Rights)*, [1947] A.C. 503 at 518.

jurisdiction over capacity to marry, while the provinces have exclusive jurisdiction over matters of form and procedure.

In practical terms, there is very limited case law dealing with the scope of the federal power, and much case law dealing with the scope of the provincial power. As noted by Hogg, "most of the laws concerning marriage have been enacted by the provinces, and the courts have tended to construe the provincial power liberally. The scope of the federal power has been left largely undetermined."[41]

A. Federal Jurisdiction

The only legislation specifically enacted by Parliament to address capacity to marry is the *Marriage (Prohibited Degrees) Act*,[42] which sets out the prohibited degrees of consanguinity. Section 2(2) of the Act provides:

> No person shall marry another person if they are related (a) lineally by consanguinity or adoption; (b) as brother and sister by consanguinity, whether by the whole blood or by the half-blood; or (c) as brother and sister by adoption.

This is a change from the previous common law prohibitions, which were much broader. The Act is silent on other aspects of capacity to marry, such as gender and age, however, and these must therefore be derived from the common law or inferred from other existing statutes.

As part of its jurisdiction over "marriage and divorce", for example, Parliament has enacted the

---

[41] P.W. Hogg, *Constitutional Law of Canada*, Looseleaf ed. (Toronto: Carswell, 1999) Vol. 1 at 26-3.

[42] S.C. 1990, c. 46.

Divorce Act[43] containing some provisions which might be interpreted to restrict the scope of marriage:

> 2. (1) Definitions – In this Act, ... 'spouse' means either of a man or a woman who are married to each other;

This section of the *Divorce Act* reflects the implicit assumption that marriage may only exist between a man and a woman.[44] Throughout the Act, the statutory presumption is that divorce is only available to those defined as "spouses" pursuant to s. 2:

> 8. (1) Divorce – A court of competent jurisdiction may, on application by either or both spouses, grant a divorce to the spouse or spouses on the ground that there has been a breakdown of their marriage.

Similarly, the reference in the *Divorce Act* to an application "by either or both spouses" clearly contemplates that there will be only two parties to a marriage. This is consistent with the prohibition in the *Criminal Code*, which provides that it is an offence to go through a form of marriage while already married.[45]

Since Parliament has only exercised its jurisdiction over marriage to a limited extent, there is little jurisprudence on the boundaries of that power. The only legal challenge to the exercise of federal power over marriage is the Privy Council decision in *Re the Marriage Law of Canada*.[46] This appeal concerned the constitutionality of an amendment to the *Marriage Act*[47] that declared every marriage performed in accordance with the laws of the place where it was performed to be a valid marriage everywhere in Canada.

---

[43] R.S.C. 1985 (2nd Supp.), c. 3 (amended by R.S.C. 1985, c. 27 (2nd Supp.), s. 10 and S.C. 1990, c. 18).

[44] See *infra* at Part Three, Section II.A.1 for a discussion of other federal measures which reflect the view that marriage is restricted to opposite-sex couples only.

[45] *Criminal Code of Canada*, R.S.C. 1985, c. C-46, s. 290(1)(a)(i).

[46] *Supra* note 18.

[47] R.S.C. 1906, c. 105.

The Privy Council struck the amendment down as being *ultra vires*, and rejected the idea that all rules going to the validity of marriage were within federal authority under s. 91(26) of the *Constitution Act, 1867*. The Privy Council held that the provinces could also legislate on questions of validity:

> ...their Lordships have arrived at the conclusion that the jurisdiction of the Dominion Parliament does not, on the true construction of secs. 91 and 92, cover the whole field of validity. They consider that the provision in sec. 92 conferring on the provincial Legislature the exclusive power to make laws relating to the solemnization of marriage in the province, operates by way of exception to the powers conferred as regards marriage by sec. 91, and enables the provincial legislature to enact conditions as to solemnization which may affect the validity of the contract.[48]

The Privy Council did give some indications concerning the types of provincially-imposed conditions that could affect the validity of marriage, such as formalities by which the contract is to be authenticated, and conditions stipulating who can perform the ceremony.

B. Provincial Jurisdiction

As previously noted, the provincial power has been tested far more often in court than the federal power. This section examines different subject areas to determine which provincial requirements have been upheld by the courts as falling properly within provincial jurisdiction, and which requirements have been deemed *ultra vires*.

---

[48] *Supra* note 18 at 887, per Viscount Haldane.

1. Procedural Matters

The clearest examples of the valid exercise of provincial legislative authority relating to solemnization of marriage arise in cases which consider the procedures and forms required by a province as a prerequisite to marriage.

(a) Issuing Licences

The case of *Alspector* v. *Alspector*[49] concerned the validity of a marriage for which no license had been issued. In holding that the marriage was valid, the Court considered whether the province of Ontario had jurisdiction to enact various provisions of the *Marriage Act*,[50] and concluded:

> It must now be taken as established beyond legal controversy that it is within the legislative competence of a Provincial Legislature to enact conditions as to solemnization of marriage in the Province which may affect the validity of the contract ... The issuance of a licence or special permit and the publication of banns as pre-ceremonial requirements, are formalities falling within the matters designated by 'Solemnization of Marriage.'[51]

(b) Who can perform the marriage ceremony

In *Gilham* v. *Steele*,[52] the British Columbia Court of Appeal considered the constitutionality of s. 8(3) of the *Marriage Act*,[53] which stipulated that a marriage not solemnized by a registered minister is invalid. The Court upheld this section, relying on *Re the Marriage Law of Canada*:[54]

> [T]here can, I think, be no doubt that a provincial Legislature has 'the exclusive capacity to determine by whom the marriage ceremony might be performed, and to make the officiation of the proper person a condition of the validity of the marriage'.[55]

---

[49] [1957] O.R. 454 (C.A.).

[50] R.S.O. 1937, c. 207.

[51] *Supra* note 49 at 464.

[52] [1953] 2 D.L.R. 89 (B.C.C.A.).

[53] R.S.B.C. 1948, c. 201.

[54] *Supra* note 18.

[55] *Supra* note 52 at 98.

2. Gender

In the two reported cases to date dealing with marriage applications by same-sex couples, it appears to be accepted that regulating the gender of parties to a marriage is a matter of federal jurisdiction. The case of *Re North et al. and Matheson*[56] concerned a challenge to the denial of a marriage licence to two men. Although the constitutionality of a provincial provision was not in issue, the Court expressed its *obiter* opinion that regulating the gender requirements for marriage would be outside the jurisdiction of the provincial Legislatures:

> I cannot conclude that the Legislature, in using the words "any two persons" intended to recognize the capacity of two persons of the same sex to marry. Even if I could conclude that such was the intention of the Legislature, I would have no hesitation in finding that such a provision is clearly ultra vires as being part of the substantive law of marriage and divorce, a matter exclusively within the legislative competence of the Parliament of Canada under s. 91(26) of the *British North America Act, 1867*. I would view such a provision as affecting the essential capacity of a person to marry, and not as a condition as to the solemnization which is within the legislative competence of the provincial Legislatures under s. 92(12).[57]

This approach was affirmed in the case of *Layland* v. *Ontario (Minister of Consumer & Commercial Relations)*[58] in which the majority of the Court considered that persons of the same sex do not have the capacity to marry each other "under the common law of Canada applicable to Ontario".[59]

3. Age

Courts have struggled with the categorization of provincial age requirements. The federal common law regarding the minimum age for marriage provides that:

---

[56] (1974), 20 R.F.L. 112; 52 D.L.R. (3d) 280 (Co. Ct. Winn.) [hereafter "*North and Matheson*"].

[57] *Ibid.* at 282.

[58] (1993), 14 O.R. (3d) 658; 104 D.L.R. (4th) 214 (Div. Ct.) [hereafter "*Layland*"].

[59] *Ibid.* at 663.

> the marriage of a child of less than seven years is void. The marriage of a male older than seven years but younger than 14 years, or a female older than seven but younger than 12 years, is voidable at the instance of the infant upon his or her attaining the requisite minimum age.[60]

In the absence of federal statute law identifying a minimum marital age, however, courts have strained to uphold the validity of provincial age restrictions by classifying them as matters of solemnization rather than capacity. The two main issues that have been considered are the capacity of minors to marry and the constitutionality of requirements for parental consent.

(a) Minors

In *Ross* v. *MacQueen*,[61] the Alberta Supreme Court considered the constitutionality of a provision of the *Solemnization of Marriage Act*,[62] which imposed a minimum age requirement as follows:

> s. 24(1) No license shall be issued where either of the parties to an intended marriage is under the age of sixteen years, and no banns shall be published in respect of any such marriage, nor shall a marriage be solemnized when either of the contracting parties is under the age of sixteen years;
>
> (2) This section shall not apply in the case of a female who is shown to be pregnant by the certificate of a duly qualified medical practitioner and who has obtained the consents required by section 21 or an order made pursuant to section 23 dispensing with any such consent.

In upholding s. 24(1) as a matter of solemnization rather than capacity, the Court based its finding on two factors: firstly, that the provision in question only affected the preliminaries leading up to the marriage; and secondly, that the fact that a minor female could marry in the event of pregnancy suggested to the Court that there was not an absolute restriction on capacity to marry.

---

[60] *Legebokoff* v. *Legebokoff et al* (1982), 136 D.L.R. (3d) 566 at 568. See also *Kerr* v. *Kerr*, [1934] S.C.R. 72 at 77; *Hobson* v. *Gray* (1958), 13 D.L.R. (2d) 404 at 408 (Alta S.C.).

[61] [1948] 2 D.L.R. 536 (Alta. S.C.).

[62] R.S.A. 1942, c. 303.

Section 24(1) of the Alberta statute received further consideration in *Hobson* v. *Gray*[63] in which it was once again upheld by the Court. The Court acknowledged that restrictions on capacity to marry fall outside provincial jurisdiction, stating:

> The Legislature cannot be presumed to have intended to act beyond its competence. Therefore s.24 should not be interpreted as relating to 'capacity' to marry (which would be beyond Provincial competence) if any other reasonable interpretation can be given to the section. ... If s. 24 of the Provincial statute purports to affect that capacity then it is clearly *ultra vires* of the Provincial legislation.[64]

Nonetheless the Court interpreted the provision as relating only to solemnization:

> There is no prohibition against the parties to the marriage prohibiting them from entering into the marriage, or taking part in the marriage ceremony. In my view, the section was intentionally so worded because it was not intended to affect the capacity of anyone to marry, but was intended to relate only to those matters which in the words of the Supreme Court of Canada in the *Underwood* case, are steps or preliminaries leading to marriage.[65]

In other words, rather than denying capacity to minors, s. 24(1) only applies to the issuers of licences or publisher of banns, by providing that a licence shall not be issued, banns shall not be published and a marriage shall not be solemnized where either party is a minor.

The result in these cases has been strenuously criticized by Leslie Katz,[66] who suggests that *if* the reasoning is correct, *any* conditions can be validly imposed by provincial legislatures so long as they are expressed as conditions precedent to obtaining a marriage licence, a result which Katz considers would undermine the constitutional division of powers.

---

[63] *Supra* note 60.

[64] *Ibid.* at 408 (per Egbert J.).

[65] *Ibid.* at 409.

[66] See L. Katz, "The Scope of the Federal Legislative Authority in Relation to Marriage" (1975) 7 Ottawa L. Rev. 384.

A similar provision in the legislation of British Columbia was considered in *Legebokoff* v. *Legebokoff et al*,[67] which dealt with the effect of non-compliance with the following provisions of the *Marriage Act*:[68]

> s. 25(1): Except as provided in subsections (2) and (3), no marriage of any person under the age of 16 years shall be solemnized, nor shall a licence be issued;
> s. 26: Nothing in section 24 or 25 invalidates a marriage.

The Court found that a marriage involving a 15-year old girl was valid, since Parliament had not enacted legislation dealing with the age of consent, and, in the absence of such legislation, the girl had the capacity to marry at federal common law:

> Though the ceremony of the parties may have lacked a formality, both parties had the capacity to marry. Accordingly, the Commissioner did not err when he found the marriage was validly entered into notwithstanding the fact the petitioner was 15 years of age.[69]

Interestingly, the Court did not question the constitutionality of ss. 25(1), which might suggest that the Court considered the age restriction to be constitutional. By upholding the validity of a marriage that failed to satisfy the provincial age restriction, however, the Court could equally be considered to have "read down" the legislation to ensure constitutional compliance by classifying the failure to meet the provincial age requirement as a ceremonial "lack of formality", rather than a matter of "capacity" which would remain within exclusive federal jurisdiction.

(b) Parental consent

The second age-related restriction that has been considered is the validity of requirements of parental consent. In *Kerr* v. *Kerr*,[70] the Supreme Court of Canada considered, among other

---

[67] *Supra* note 60.

[68] R.S.B.C. 1979, c. 251.

[69] *Supra* note 60 at 569 (per MacKinnon J.).

[70] *Supra* note 60.

things, the constitutionality of two provisions of the Ontario *Marriage Act*,[71] one of which required parental consent as a condition precedent to a valid marriage, and the other of which stipulated that a marriage without consent is void. These provisions were upheld by the Court. As Duff C.J. stated:

> [I]n exercise of its jurisdiction in relation to the subject reserved to the provinces by s. 92(12), 'Solemnization of Marriage', the legislature of a province may lawfully prescribe the consent of the parents or guardian to the marriage of a minor as an essential element in the ceremony of marriage itself. ...The legislature is, I think, dealing with the solemnities of marriage and not with the capacity of the parties.[72]

The Court relied on the case of *Sottomayor* v. *De Barros*[73] for the principle that consent is a part of the *ceremony* of marriage, and not a matter going to capacity. Duff C.J. did, however, leave open the question as to whether Parliament could also legislate consent as a matter of capacity:

> No such question arises here, and it is quite unnecessary to pass an opinion upon it. The authority of the Dominion to impose upon intending spouses an incapacity which is made conditional on the absence of certain nominated consents is not in question.[74]

The "double aspect" principle was also mentioned in *obiter* comments:

> [o]ne principle it is essential to bear in mind, in construing the *British North America Act*, is that a matter which, for one purpose and from one point of view, may fall within a subject reserved to the Dominion, may, for another purpose and from another point of view, fall within a subject reserved to the provinces; and that, when such is the case, legislation regarding such matters, from the proper provincial point of view, and for the proper provincial purpose, will take effect in the absence of legislation in the same field by the Dominion.[75]

The *Kerr* v. *Kerr* decision was further upheld in *Alberta (Attorney General)* v. *Underwood*,[76] in which the Supreme Court of Canada reiterated that "parental consent is a requirement similar in

---

[71] R.S.O. 1927, c. 181.

[72] *Supra* note 60 at 74.

[73] (1877), 3 Prob. Div. 1 at 7.

[74] *Supra* note 60 at 75-76.

[75] *Ibid.* at 76.

[76] [1934] S.C.R. 635.

quality to the other requirements concerning the banns or the marriage licenses. It is one of the forms to be complied with for the marriage ceremony, and it does not relate to capacity."[77] In reaching this conclusion, the Court further defined the "solemnization of marriage":

> Solemnization of marriage is not confined to the ceremony itself. It legitimately includes the various steps or preliminaries leading to it. The statute of Alberta [s. 20], in its essence, deals with those steps or preliminaries in that province. It is only territorial. It applies only to marriages solemnized in Alberta and it prescribes the formalities by which the ceremony of marriage shall be celebrated in that province.[78]

The reasoning applied by the Court to reach this conclusion seems difficult to sustain. Virtually all provincial legislation will be, by definition, "only territorial", and apply only within the relevant province, but this does not preclude it being an usurpation of federal authority. Nonetheless, parental consent requirements seem easier to sustain as primarily procedural than actual restrictions on the capacity to marry of minors.

4. Consanguinity

(a) General restrictions

Provincial restrictions on consanguinity raise particular challenges, since this is an area in which the federal government has legislated. As a result, it is arguably more difficult for courts to construct these provisions as procedural only, and there is clear potential for conflict between federal and provincial laws.

The case of *Teagle* v. *Teagle*[79] considered whether a woman may marry the brother of a husband she has divorced during the lifetime of the divorced husband. Although there was no provincial provision at issue, the Director of Vital Statistics had printed a table, on the reverse

---

[77] *Ibid.* at 640 (per Rinfret J.).

[78] *Ibid.* at 639.

[79] [1952] 3 D.L.R. 843 (B.C.S.C.).

side of a provincial statutory declaration used in marriage ceremonies, that purported to set out the prohibited degrees of consanguinity and affinity under the common law. The Court ruled that the marriage was a nullity, based upon the law of England as it was received in British Columbia, but also acknowledged that there was a "regrettable lack of uniformity in the laws of some of the Provinces", and suggested that it is up to Parliament to legislate on matters concerning the prohibited degrees:

> ...the present obscure state of the law might well be considered by the Dominion Parliament, and the law clarified by legislation either permitting or prohibiting such marriages as this. ... Ontario, Manitoba and Saskatchewan have adopted their own tables of prohibited degrees of consanguinity and affinity purporting to have the force of law. The jurisdiction of those Provinces to legislate in matters affecting the validity of marriages may be open to question but presumably marriage licences are issued in consonance with the tables they have adopted.[80]

Similar issues arose in *Re Schepull and Bekeschus and The Provincial Secretary,*[81] which dealt with the question of whether a man may lawfully marry his divorced wife's sister. As in *Teagle* v. *Teagle*, there was no provincial legislation at issue that contained an explicit reference to consanguinity or affinity. In clarifying the powers of the Provincial Secretary, the Court agreed with counsel for both the applicants and the respondent that "the legislative power in reference to prohibited degrees of affinity is in the Parliament of Canada and not the Legislature of Ontario," and went on to say:

> [I]f the statute did purport to grant to the Provincial Secretary a discretion to make rulings upon the subject-matter of prohibited degrees of affinity, it would be to that extent *ultra vires*...[82]

---

[80] *Ibid.* at 847 (per Whittaker J.).

[81] [1954] O.R. 67 (S.C.).

[82] *Ibid.* at 71-72 (per Spence J.). Note that although the case affirms *Teagle* on this point, a different conclusion was ultimately reached on the validity of the marriage.

The lack of provincial jurisdiction over consanguinity was exemplified in *Re Christians and Hill.*[83] This case examined s. 13 of the *Marriage Act,*[84] which required parties to an intended marriage to swear on a form prescribed by regulation that there was no affinity or consanguinity to bar the solemnization of the marriage, with degrees of affinity and consanguinity listed on the reverse of the form.

The court rejected the respondent's submission that the prohibited degrees of consanguinity set out on the form were only "declaratory" of the existing law, and ruled that the regulation was *ultra vires*, because one item on the list of degrees of affinity and consanguinity was inconsistent with federal law.

The case leaves open the question of whether a province can enact legislation on the prohibited degrees of affinity and consanguinity which is consistent with federal statutory or common law on the same subject. It would be difficult for a province to assert jurisdiction in this regard, however, since if the matter of consanguinity relates in pith and substance to capacity to marry rather than solemnization – which seems to be accepted by the courts – then it falls within the jurisdiction of Parliament alone, and under the doctrine of exclusivity may not be addressed by provincial Legislatures. The double aspect principle can only apply to save such legislation if the law addresses an equally valid matter falling within an area of provincial jurisdiction, and consanguinity measures do not appear to be "necessarily incidental" to the valid provincial power over solemnization of marriage. Finally, the paramountcy doctrine can only be invoked to provide that the federal law prevails when each of the provincial and federal statutes would otherwise be valid.

---

[83] (1981), 123 D.L.R. (3d) 471 (Alta. Q.B.).

[84] R.S.A. 1970, c. 226.

Perhaps the best interpretation of the consanguinity cases is that the courts "read down" the provincial laws as a matter of construction, so that the provincial charts and forms are seen as merely reflective or informative of the state of federal law, rather than themselves creating a legislative provincial bar based on prohibited degrees of consanguinity. This would explain why the impugned regulation in *Christians* v. *Hill* was considered invalid, since being inconsistent with the federal statute it could not be construed as merely reflective of existing federal law.

(b) Adopted persons

One area in which provinces appear to have successfully asserted jurisdiction to extend the consanguinity requirements is in the application of those requirements to adopted persons. *Re Broddy et al. and Director of Vital Statistics*[85] concerned the constitutionality of a provision of the *Child Welfare Act*,[86] which imposed a status of notional consanguinity on an adopted child and his or her adoptive relatives, and thus deemed adoptive relatives to be within the prohibited degrees of consanguinity under federal law.

Using the "necessarily incidental" doctrine, the Court upheld the provision notwithstanding that it affected the *capacity* of the parties to marry (although the Court read down the provision for other reasons).

The Court reasoned that the legislation was in "pith and substance" a matter of adoption (which is within provincial legislative competence under the "property and civil rights" provisions of s. 92(13) of the *Constitution Act, 1867*), and only incidentally affected marriage and divorce.

---

[85] (1983), 142 D.L.R. (3d) 151 (Alta. C.A.).

[86] R.S.A. 1980, c. 8.

In considering the province's ability to regulate the capacity to marry, the Court stated:

> It was also argued that capacity to marry, as legislative subject-matter, is exclusively reserved to Canada. I do not accept this proposition.
>
> It is correct that, in the context of analysis of the head "Solemnization of Marriage" (another head of provincial competence under s. 92), the jurisprudence denies provincial competence over capacity to marry. ... solemnization has been found to mean formalities, not capacity. But, here, a province invokes its competence about adoption, not solemnization. ...
>
> In my reading of [*Re Marriage Law of Canada*], solemnization should be understood as only one example of how a province can, in the valid exercise of provincial legislative competence, declare a marriage to be invalid.[87]

Earlier, the Court had stated:

> The appellant first argues that it is *ultra vires* the province to make laws which affect the capacity to marry. But, so long as such laws are about a matter falling within a head of provincial legislative competence and do not collide with a valid federal law, they are valid notwithstanding that the same subject has an aspect which would validate a similar federal law.[88]

In summary, the Court established that a province can enact legislation affecting the capacity of parties to marry, so long as the legislation is necessarily incidental to an otherwise valid exercise of provincial power under the *Constitution Act, 1867*, and so long as the legislation does not contradict valid federal legislation on the same subject (in which case the doctrine of paramountcy would have to be invoked).

5. Divorce

The two federal subject matters of "marriage" and "divorce" can intersect, as was the case in *Helens* v. *Densmore*,[89] which concerned a provision in a British Columbia statute that only permitted the remarriage of a divorced person after the determination of an appeal or the expiration of the time for appealing.

---

[87] *Supra* note 85 at 155-156 (per Kerans J.A.).

[88] *Ibid.* at 153.

[89] [1957] S.C.R. 768.

A majority of the court found that the enactment of the provision was unnecessary, since the federal common law (inherited from England) was in force in the province. Rand J. commented as follows:

> That being the provincial law before Confederation, it became thereafter law as if enacted by Parliament. As paramount law, it would determine the capacity for marriage of the person affected throughout Canada; and there could be no question of a Province not giving it recognition. Apart from questions of solemnization, with one source of law for marriage and divorce, personal capacity or incapacity is the same throughout the nation.[90]

As a result, legislative authority to deal with the ability of divorced persons to remarry was deemed to fall exclusively within federal jurisdiction and to be covered by federal common law in the absence of any federal legislative enactment.

6. Validity of marriages

A fundamental aspect of the Privy Council decision in *Re the Marriage Law of Canada*[91] is that Parliament cannot assert exclusive jurisdiction over the validity of marriages, since the provinces are entitled to prescribe conditions for the enforcement of the formal requirements of the solemnization of marriage, including deeming a marriage invalid if the formal requirements have not been met. As the Supreme Court of Canada affirmed in *Kerr* v. *Kerr*:

> The authority of the provinces, therefore, extends not only to prescribing such formalities as properly fall within the matters designated by "Solemnization of Marriage"; they have the power to enforce the rules laid down by penalty, by attaching the consequence of invalidity, and by attaching such consequences absolutely or conditionally.[92]

Invalidity of a marriage remains, however, a serious consequence, which courts are reluctant to infer unless the terms of the statute are clear:

---

[90] *Ibid.* at 784, per Rand J.

[91] *Supra* note 18.

[92] *Supra* note 60 at 75.

> Although a marriage licence, the publication of banns, or the consent of parents, is made by statute a prerequisite to the solemnization of marriage, the non-fulfilment of such requirement does not render a marriage void or voidable unless the statute expressly or by clear necessary intendment so provides.[93]

C. Conclusions

As the preceding analysis demonstrates, courts have not only upheld federal laws that *prima facie* go to capacity and provincial laws that *prima facie* go to solemnization, but have also upheld some provincial laws that *prima facie* appear to go to capacity. Courts have also said that provinces may enact conditions as to solemnization that affect the validity of a marriage.

1. Matters relating *prima facie* to capacity

The courts' findings on the validity of laws that relate *prima facie* to capacity (consanguinity, gender, capacity of divorced people, age) may be summarized as follows:

(a) Prohibited degrees of consanguinity:
  (i) *intra vires* federal;
  (ii) *intra vires* provinces provided the law is merely reflective or informative of the federal law;
  (iii) *intra vires* provinces if in pith and substance a matter relating to some other valid head of provincial power, such as adoption;

(b) Gender of the parties to a marriage:
  (i) *intra vires* federal;
  (ii) *intra vires* provinces (obiter);

(c) Capacity of divorced people to marry:
  (i) *intra vires* federal;

(d) Minimum age requirement:
  (i) *intra vires* federal;

---

[93] See *Hobson* v. *Gray*, *supra* note 60 at 410.

(ii) *intra vires* provinces where only goes to issuance of license not validity of marriage;

(iii) *intra vires* provinces where only a matter of parental consent.

2. Matters relating *prima facie* to solemnization

Courts have held the following laws are *intra vires* the provinces:

(a) restrictions on who can perform the ceremony;
(b) issuance of a licence; and
(c) publication of banns.

While many of the matters held to fall within provincial jurisdiction are uncontroversial, the acceptance that a minimum age requirement may fall within the solemnization power must surely stretch the boundaries of constitutional interpretation. A parental consent requirement could possibly be construed as a procedural matter falling within provincial jurisdiction, but an absolute bar to marriage for persons under a certain age appears to relate squarely to capacity. The justification that the age restriction is a temporary obstacle, since minors need only wait until they reach the permitted age, is unconvincing, but does at least suggest a means for distinguishing the age restriction from other restrictions related to capacity, such as gender and consanguinity.

PART THREE

MARRIAGE OF SAME-SEX COUPLES

I. Introduction

The question of access to marriage by same-sex couples serves as a useful lens through which to further assess the principles identified in the preceding section. Existing case law has assumed that restricting marriage to opposite-sex couples is a matter relating to capacity, and therefore falls within the exclusive competence of the federal government. The province of Quebec, however, purports to explicitly restrict marriage to opposite-sex couples in article 365 of the *Civil Code*,[94] and Alberta has recently enacted legislation, the express purpose of which is to define marriage as limited to a union between a man and a woman. The Alberta legislation even goes so far as to invoke the constitutional "notwithstanding" clause in an effort to immunize the ban on marriage for same-sex couples from constitutional scrutiny. Many other provinces, while not explicitly prohibiting marriage for same-sex couples, maintain marriage legislation containing language that is clearly premised on the assumption that applicants for a marriage licence will be of the opposite sex. In the case *of Hendricks & LeBoeuf* v. *Procureur général du Québec*,[95] the constitutionality of article 365 of the Quebec *Civil Code* is being challenged by two gay men seeking to marry. Even if article 365 were struck down as falling outside provincial competence, however, consideration would still need to be given to whether any federal impediment to marriage for same-sex couples remained.

---

[94] See *infra* note 167.

[95] Request for declaratory judgment filed September 14, 1998, Cour supérieure du Québec); no date yet set for hearing.

This section will begin with an examination of those federal and provincial laws which purport to restrict marriage to opposite-sex couples, and will then consider the extent to which those laws which do exist fall within the jurisdiction of the enacting legislature.

II. Source of Restrictions on Marriage for Same-sex Couples

In examining the various federal and provincial laws which could be used to restrict a same-sex couple's right to marry, it is necessary to consider both explicit prohibitions as well as legislation which may be interpreted as representing a prohibition on marriage for same-sex couples, even though no specific language to that effect is used. At the federal level, consideration will be given to both statutory and common law provisions, while at the provincial level consideration will be given to the relevant legislation for each province dealing with the solemnization of marriage.

A. Federal

1. Statutes

The most striking aspect to the federal government's statutory response to this issue is the absence of any explicit prohibition on equal marriage rights for same-sex couples. As previously discussed, Parliament's only legislation explicitly addressing capacity to marry is the

Marriage (Prohibited Degrees) Act,[96] which contains restrictions on consanguinity, but is silent regarding any gender criteria.[97]

On two occasions, the House of Commons has held votes expressing its opposition to equal marriage rights for same-sex couples, although in each case the legislative pronouncement has limited legal impact. On June 8, 1999, the House of Commons adopted a Reform Party motion that provided:

> That, in the opinion of this House, it is necessary, in light of public debate around recent court decisions, to state that marriage is and should remain the union of one man and one woman to the exclusion of all others, and that Parliament will take all necessary steps within the jurisdiction of the Parliament of Canada to preserve this definition of marriage in Canada.

The words "within the jurisdiction of the Parliament of Canada" were added by way of an amendment to the original motion by Minister of Justice Anne McLellan, who stated that she moved the amendment "to clarify for everyone in the House and in the country that we as a parliament are operating within our jurisdiction."[98]

The motion was introduced by Eric Lowther MP, the Reform Party Critic on Children and Families, who took the position that:

> [T]he definition of marriage in Canada needs to be strengthened and protected before the courts, by ruling on one case, tell us that the opposite sex definition of marriage is unconstitutional. ... Some say that the last thing that remains is the full blown establishment of homosexual marriage in Canada as a normative practice. It becomes somewhat self-evident that sooner or later the opposite sex definition of marriage will be challenged in the courts. ... What about children? Teachers, and my wife is one, have a saying. They say that more is caught than taught. Intimate, committed marriage provides the best possible learning ground for the socialization and character development of

---

[96] S.C. 1990, c. 46.

[97] However, implicit in the "as brother and sister" restrictions is the assumption that the people seeking to marry are of the opposite sex.

[98] Hansard, *House of Commons Debates* (June 8, 1999) at para. 1115.

> children. ... Marriage provides children with parental fullness, versus the gender deprived parenting of same sex relationships.[99]

The motion was adopted by the House of Commons by a vote of 182 to 63. However, it represents a statement of position only. As a supply day motion, it did not receive consideration by the Senate, nor does it constitute legislation or have the force of law.

The federal government enacted a similar provision during recent debates around Bill C-23, the *Modernization of Benefits and Obligations Act*, which was introduced on February 11, 2000. This Bill amends some 68 federal laws, identifying both same-sex and opposite-sex unmarried couples as "common law partners", and extending to common law partners all the rights and responsibilities of opposite-sex married couples (with the exception of those rights and responsibilities directly related to the institution of marriage itself, such as the provisions of the *Divorce Act*). The Summary to the Bill articulates the purpose of the legislation as follows:

> This enactment extends benefits and obligations to all couples who have been cohabiting in a conjugal relationship for at least one year, in order to reflect values of tolerance, respect and equality, consistent with the *Canadian Charter of Rights and Freedoms*.

On March 23, 2000, however, the House of Commons Standing Committee on Justice and Human Rights voted to adopt a government amendment to Bill C-23, which inserted an interpretative clause to recognize marriage as restricted to opposite-sex couples only. The clause reads:

> Interpretation
>
> 1.1 For greater certainty, the amendments made by this Act do not affect the meaning of the word 'marriage', that is, the lawful union of one man and one woman to the exclusion of all others.

---

[99] Hansard, *House of Commons Debates* (June 8, 1999) at para. 1025.

At the Committee, Svend Robinson, M.P., moved a motion to amend the Government proposal to end after the word "marriage". This would have had the effect of affirming that the Bill does not affect the meaning of marriage, but would not go further and define marriage in explicitly heterosexual terms. The motion was, however, defeated.

Reform Party M.P. Eric Lowther then proposed his own motion, to expand the government amendment so that the restrictive definition of marriage would apply not just to Bill C-23 but throughout "all federal laws". This too was defeated.

At third reading on April 11, 2000, the Bill was adopted by the House of Commons, with the amendment. If adopted by the Senate in its existing form, it will become the first federal statutory enactment to define marriage as restricted to opposite sex couples only.

At the same time, however, the amendment is only an interpretative provision, and simply provides that the provisions of Bill C-23 "do not affect" the definition of marriage. As a result, s. 1.1 does not itself constitute a legislative source of a prohibition on marriage for same-sex couples.

Detailed evidence on the legal impact of the proposed amendment was provided by Justice Department officials during Committee hearings:

> **Ms. Lisa Hitch (Senior Counsel, Modernizing Benefits and Obligations Team, Department of Justice):** The bill itself does not deal with marriage, as the minister has stated repeatedly. The bill itself deals with some of the benefits and obligations that attach to married people and to other conjugal couples. This interpretation provision is limited to the same intention as is the rest of the statute, so this would simply apply to those 68 statutes that are listed in Bill C-23.
>
> **Mr. Svend Robinson:** ... I want to understand what you're saying. There would be no change with respect to the legal issue of capacity to marry within federal jurisdiction. Is that correct?

> **Ms. Lisa Hitch:** Yes. Let me say that what's happening in the 68 statutes does not create the legal institution of marriage. It merely reflects how that institution will be treated for the particular purposes of 68 statutes. If the word "marriage" was not listed in any of those 68 statutes, it would not affect the legal capacity to marry. The definition of marriage is outside of statute law. It's in the common law, as are the requirements for who can validly contract a marriage, except for the limited purpose of people who are too closely related, which is in the Marriage (Prohibited Degrees) Act.
>
> **Mr. Svend Robinson:** Mr. Chairman, just for clarification, should there be a legal challenge in future, similar to that in Layland and Beaulne, with respect to the fundamental issue of capacity to marry within federal jurisdiction, what I understand the witness to be saying is that the adoption of the words ... would not be relied on by the Attorney General in any way as a bar to that issue of capacity. Is that correct?
>
> **Ms. Lisa Hitch:** If there was a challenge to the legal definition of marriage, it would have to be a challenge to what created the legal definition of marriage, and that would be the common law case as consistently applied in Canada since Confederation. This particular provision could be cited, and likely would be cited—forgive me, because I really should not be giving opinions on speculation—in court by the Attorney General in support of the argument, but it is not what creates the legal capacity to marry in Canada.
>
> ... However, what I can say is that a court challenge to the legal definition of marriage would not be against this bill or anything in this bill. It might cite the fact that there was now this wording in the bill, but it would have to be against the source of the legal capacity to marry, which comes from the common law at the federal level.[100]

This portion of the transcript clarifies that the amendment defining marriage is interpretative only, applies only to those statutes contained within Bill C-23, and does not itself create any statutory prohibition on marriage for same-sex couples, which the Department of Justice acknowledges to be sourced in federal common law. The only impact of the interpretative provision is that it might be cited in support of the Government's position in a future court challenge to the common law.

It should also be noted that occasional federal attempts have been made to address equal marriage rights for same-sex couples in an expansive, rather than restrictive, way. In 1997, for example, Svend Robinson, M.P. introduced a Private Member's Bill seeking to extend the right to marry to same-sex couples. Bill C-385 would change the name of the *Marriage (Prohibited*

---

[100] Hansard, *Standing Committee on Justice and Human Rights* (March 23, 2000) at paras 1100–1105, 1110.

Degrees) Act to *An Act Respecting the Capacity to Marry*, and would add the following as section 4.1:[101]

> A marriage between two persons is not invalid by reason only that they are of the same sex.[102]

2. Common law

(a) Is there a common law prohibition?

The Government of Canada has taken the clear position that federal common law prohibits same-sex couples from marrying. Minister of Justice Anne McLellan, speaking in support of the Reform Party motion defining marriage in exclusively heterosexual terms, stated:

> As stated in the motion, the definition of marriage is already clear in law. It is not found in a statute, but then not all law exists in statutes, and the law is no less binding and no less the law because it is found in the common law instead of in a statute.
>
> The definition of marriage, which has been consistently applied in Canada, comes from an 1866 British case which holds that marriage is "the union of one man and one woman to the exclusion of all others". That case and that definition are considered clear law by ordinary Canadians, by academics and by the courts. The courts have upheld the constitutionality of that definition.
>
> ... [T]he definition of marriage ... is clear in the law of Canada and it was the courts that made the definition clear. As I indicated in my comments, the definition of marriage as a union between one man and one woman is found in the common law of our country and the common law of our system of law. It is also found in the civil law of the country.[103]

This position was further reiterated by the Minister in her public statements on Bill C-23. During her speech at second reading, she stated:

> Equally important, Bill C-23 [preserves] the existing legal definition and societal consensus that marriage is the union of one man and one woman to the exclusion of all others. ... This definition of marriage, which has been consistently applied in Canada and

---

[101] As is common for a Private Member's Bill, however, this Bill has not been selected or drawn to proceed to Committee hearings or debate.

[102] Bill C-385, *An Act to Amend the Marriage (Prohibited Degrees) Act* (1st Sess., 36th Parl., 1997)

[103] Hansard, *House of Commons Debates* (June 8, 1999) at para. 1100.

> which was reaffirmed last year through a resolution of the House, dates back to 1866. It has served us well and will not change.[104]

The 1866 British decision referred to is *Hyde* v. *Hyde & Woodmansee*[105] dealing with polygamy, in which the Court set out the following definition of marriage:

> I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman to the exclusion of all others.

This definition was adopted by a Canadian court in *North and Matheson*[106] the first Canadian case to consider the common law as it relates to marriage for same-sex couples.

North and Matheson concerned two gay men who had complied with the requirements of the *Marriage Act* relating to the publication of banns, the delivery of medical certificates, the solemnization of the marriage by a duly qualified person in the presence of witnesses and the delivery of the certificate and other necessary documents. The Registrar nonetheless refused to register the marriage, and the applicants sought an order compelling him to do so.

Philp Co. Ct. J. acknowledged that no statutory enactment of either the provincial or federal government purported to restrict marriage to opposite-sex couples, and proceeded to consider the common law requirements. He rejected the applicants' claim, based upon the definition of marriage set out in the *Hyde* case and the finding in *Corbett* v. *Corbett (Ashley) (No. 2)*[107] in which Ormrod J. ruled that "the capacity for natural heterosexual intercourse" is an essential element of the concept of marriage.

---

[104] Hansard, *House of Commons Debates* (February 15, 2000) at para. 1100.

[105] (1866), L.R. 1 P&D 130 at 133 [hereafter "*Hyde*"].

[106] *Supra* note 56.

[107] [1970] 2 All E.R. 33 at 48 [hereafter "*Corbett*"].

The *Corbett* decision concerned whether a male to female transsexual was a "wife or a woman for the purposes of marriage." The petitioner knew at marriage that the respondent was male at birth, and had undergone a sex change operation and the "construction of an artificial vagina." After 14 days of marriage, the petitioner filed for a declaration that the marriage was null and void because the respondent was a person of the male sex. Ormond J. granted the petition on the basis firstly, that the respondent was a man, and secondly, that the respondent was not capable of consummating the marriage.

The *Corbett* decision was further applied by the Ontario Court (General Division) in *C.(L.)* v. *C.(C.).*[108] In this case, the Court ruled that a marriage between a woman and a female-to-male transsexual was a nullity, because the law "as it presently exists" does not provide for marriages between persons of the same sex.

The prohibition on equal marriage rights for same-sex couples was challenged, unsuccessfully, in the *Layland* case,[109] in which the Court considered whether marriage is limited at common law to opposite-sex couples only. Southey J., on behalf of the majority, relied upon *North and Matheson* and agreed that same-sex couples are excluded from marriage by common law, stating:

> Unions of persons of the same sex are not 'marriages', because of the definition of marriage.[110]

(b) Critiques of *Hyde* and *Corbett*

Although the decisions in *Hyde* and *Corbett* have formed the basis on which Canadian courts have found that the common law restricts marriage to opposite-sex couples, it should be

---

[108] (1992), 10 O.R. (3d) 254 at 256.

[109] *Supra* note 58.

[110] *Ibid.* at 223.

recognized that the *Hyde* and *Corbett* cases have not been universally adopted or applied. Indeed, the apocryphal definition of marriage relied upon in the *Hyde* case no longer reflects the modern law of marriage. In a post-*Charter* era of religious diversity, for example, it would be inappropriate to base a legal definition on the concept of marriage "as understood in Christendom", nor is a marriage any longer legally required to be a "union for life".

The sources relied upon in the *Hyde* case itself demonstrate a somewhat narrow approach to the question of religious diversity. *Warrender* v. *Warrender*,[111] for example, affirms that "marriage is one and the same thing substantially all the Christian world over", but distinguishes Christian marriage from "the infidel marriage".

Subsequent to the *Hyde* decision, alternative views began to emerge. In *Cheni* v. *Cheni*,[112] the court recognized a potentially polygamous marriage by articulating the appropriate public policy threshold as follows:

> [T]he true test [is] whether the marriage is so offensive to the conscience of the English Court that it should refuse to recognise and give effect to the proper foreign law. In deciding that question the court will seek to exercise common sense, good manners and a reasonable tolerance. In my view, it would be altogether too queasy a judicial conscience which would recoil from a marriage acceptable to many peoples of deep religious convictions, lofty ethical standards and high civilization.

In Canada, Cory J. in *Re Hassan and Hassan*[113] considered that a husband and wife who were parties to a potentially polygamous marriage concluded in their country of origin and who had immigrated into Canada and taken up domicile in Ontario, became subject to the law of Ontario and their marriage was converted *de facto* into a monogamous marriage. As a result, he

---

[111] (1835), 2 Cl. & F 531 at 532; 6 E.R. (H.L.) 1239 at 1255. See also *Ardasser Cursetjee* v. *Perozeboye* (1856) 10 Moo. P.C. 375.

[112] [1962] 3 All E.R. 873 at 883 (P. Div.).

[113] (1976), 12 O.R. (2d) 432 (Ont. High Court of Justice).

concluded that the parties to the marriage were entitled to matrimonial relief, including, in the case of the wife, relief under the *Deserted Wives' and Children's Maintenance Act.*[114]

In reaching this decision, Cory J. held that the rule in *Hyde* does not apply in Canada, which invites immigrants from a wide variety of backgrounds and countries. Cory J. summarized Hyde as a case in which "the Court considered the effects of a polygamous marriage and contrasted it with what was termed 'a Christian marriage'."[115] Cory J. then went on to "review the history in England of the gradual erosion and final discarding of the principle enumerated by *Hyde* v. *Hyde.*"[116] In the result, Cory J. affirmed the trial judge's ruling that "the case of *Hyde* v. *Hyde* does not represent the common law in the Province of Ontario."[117]

Similarly, society's understanding of transgendered issues has evolved considerably since the *Corbett* case was decided, and *Corbett* has not been followed in a number of other jurisdictions. In *M.T.* v. *J.T.*,[118] the Appellate Division of the Superior Court of New Jersey considered a marriage case involving a post-operative male to female transsexual. The court disagreed with the conclusion reached in *Corbett* that "[s]ex is somehow irrevocably cast at the moment of birth, and that for adjudging the capacity to enter marriage, sex in its biological sense should be the exclusive standard"[119] and commented:

> Our departure from the *Corbett* thesis is not a matter of semantics. It stems from a fundamentally different understanding of what is meant by 'sex' for marital purposes. The English court apparently felt that sex and gender were disparate phenomena. ... The evidence and authority which we have examined, however, shows that a person's sex or

---

[114] R.S.O. 1970, c. 128.

[115] *Supra* note 113 at 434.

[116] *Ibid.*

[117] *Ibid.* at 433, 439.

[118] 355 A. 2d 204 (1976).

[119] *Ibid.* at 209. The Court did, however, proceed on the assumption that marriage requires partners to be of the opposite-sex.

> sexuality embraces an individual's gender, that is, one's self-image, the deep psychological or emotional sense of sexual identity and character...
>
> Such recognition will promote the individual's quest for inner peace and personal happiness, while in no way disserving any societal interest, principle or public order or precept of morality.[120]

The majority of the New South Wales Court of Criminal Appeal adopted this formulation of the New Jersey Superior Court and declined to follow *Corbett* in the case of *R.* v. *Harris and McGuinness*:

> At the time it was decided Corbett was regarded as a beacon in largely uncharted seas. In the years that have followed, many jurisdictions have voyaged upon those seas, but the beacon has by no means been universally recognized as furnishing safe navigational guidance. Moreover, as a more compassionate, tolerant attitude to the problem of human sexuality emerges amongst the civilised nations of the world, the founding of that decision on clinical factors present at birth has come under increasing criticism. Its continuing application, even in the field of marriage and divorce in the United Kingdom, has for some time been at least open to question.[121]

In *R.* v. *Cogley*,[122] the Victoria Court of Criminal Appeal also rejected *Corbett* and instead adopted the reasoning of the trial judge who had said:

> ... the law should regard as a woman, a male-to-female transsexual, where core identity is established (ie. the psychological personality or character of the person concerned) and where sexual reassignment surgery has taken place.[123]

In *Secretary, Department of Social Security* v. *S.R.A.*,[124] the Federal Court of Australia considered the application of the respondent, a male to female transsexual who had not undergone sex reassignment surgery, for social security benefits as a "wife" or "woman". The Court distinguished the *Corbett* decision, instead considering that a broad number of factors must be balanced when determining sex, including:

---

[120] *Ibid.* at 209, 211.

[121] (1988), 17 N.S.W.L.R. 158 at 160.

[122] (1989), 41 A. Crim. R. 198.

[123] *Ibid.* at 201-202.

[124] (1993), 118 A.L.R. 467 (F.C.A.).

1. Chromosomal factors;
2. Gonadal factors (presence or absence of testes or ovaries);
3. Genital factors, including internal sex organs other than the gonads (i.e. a uterus or a sperm duct);
4. Secondary sex characteristics (e.g. facial hair);
5. The sex of rearing (usually the sex assigned a birth) or the sex on assignment;
6. Psychological factors, including the subjective condition of sexual identity or sense of gender.[125]

The Court ultimately decided that the respondent was not eligible for a wife's pension under the *Act*, but considered that the respondent would have come within that category had she successfully undergone sex reassignment surgery.

Although these cases demonstrate that the Courts remain heavily influenced by biological criteria in dealing with transgendered people, it is equally clear that the rigid rejection of transgendered identity in the *Corbett* case no longer conforms with society or the law's developing understanding of issues related to gender and identity.

As a result, it is open to question whether an 1866 English decision, which was restricted to a consideration of polygamy, and a 1970 English decision which displays a very limited understanding of transgenderism, should continue to form the basis of the Canadian common law of marriage in the 21st century.

(c) Development of the common law

Although the prevailing view of the courts is that common law does indeed prohibit marriage by same-sex couples, it should be noted that the issue has never been addressed by an appellate

[125] *Ibid.* at 483 (per Lockhart J.).

Court in Canada, and the Courts have continuously affirmed that the common law is flexible enough to adapt to changing social realities.

In *R.* v. *Salituro*,[126] for example, the Supreme Court of Canada developed an exception to the common law rule against spousal competence, saying:

> At one time, it was accepted that it was the role of judges to discover the common law, not to change it. ... However, Blackstone's model of the common law has gradually been supplanted by a more dynamic view. ...
>
> [T]his Court has signalled its willingness to adapt and develop common law rules to reflect changing circumstances in society at large. ...
>
> Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared.

In deciding to develop an exception to the common law rule, the Supreme Court was influenced by the changing nature of marriage:

> The rule that a wife was an incompetent witness for or against her husband followed naturally from the legal position of a wife at the time. On marriage a woman lost her independent legal identity. ... To give paramountcy to the marriage bond over the value of individual choice in cases of irreconcilable separation may have been appropriate in Lord Coke's time, when a woman's legal personality was incorporated in that of her husband on marriage, but it is inappropriate in the age of the *Charter*.[127]

Similarly, in *R.* v. *Swain*,[128] the Supreme Court of Canada affirmed the Courts' role in modifying the common law where necessary to bring it into conformity with *Charter* values.

These principles were applied by Greer J. (dissenting) in the *Layland* case, to question the continuing validity of the common law prohibition on marriage by same-sex couples. As Greer J. noted:

---

[126] [1991] 3 S.C.R. 654 at 665-666, 670.

[127] *Ibid.* at 671, 674.

[128] [1991] 1 S.C.R. 933.

> That the common law expands to meet social needs is not a new concept. ... The common law does not remain static. Its very essence is that it is able to grow to meet the expanding needs of society.[129]

(d) Procreation and consummation

It is clear that concerns regarding procreation have been central to the Courts' willingness to date to maintain the common law prohibition on marriage for same-sex couples. In *Layland*, Southey J. states:

> The principal purpose of marriage cannot, as a general rule, be achieved in a homosexual union because of the biological limitations of such a union. It is this reality that is recognized in the limitation of marriage to persons of the opposite sex...the institution of marriage is intended by the state, by religions and by society to encourage the procreation of children.[130]

Similarly, LaForest J. (writing for the minority of the Supreme Court of Canada on this point) expressed the *obiter* view in *Egan* v. *Canada* that

> ...marriage has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long-standing philosophical and religious traditions. But its ultimate raison d'être transcends all of these and is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships, and that they are generally cared for and nurtured by those who live in that relationship.[131]

In considering whether the common law prohibits marriage by same-sex couples, it is relevant to examine the extent to which procreation remains integral to the institution of marriage.

---

[129] *Supra* note 58 at 223-224.

[130] *Ibid.* at 222.

[131] [1995] 2 S.C.R. 513 at 535-36. [hereafter "*Egan*"].

While parties to a marriage have traditionally been required to have the capacity to consummate it, there is a common misconception that "non-consummation" was a ground for annulment. In fact, the law merely required that sexual capacity be present, not that it be used.[132]

The inability to consummate a marriage rendered it voidable only.[133] Unlike marriages which are void *ab initio*, marriages that are merely voidable give rise to legal consequences and are valid, subsisting marriages unless and until a court pronounces them null and void. They may only be challenged by the parties to them, and then only during their joint lives.[134]

Moreover, sterility was not itself a ground for annulment,[135] which suggests that actual procreative potential was not a prerequisite to a valid marriage.

Based upon these principles, Canadian courts have recognized the validity of "companionate marriages", in which the parties have chosen to marry for personal, emotional or romantic reasons, with no intention or ability to procreate. In *Foster* v. *Foster*,[136] for example, the British Columbia Supreme Court declined to issue a decree of nullity in respect of a marriage entered into between a woman and a 76 year old man who lacked capacity to consummate the marriage due to his advanced age.

Similarly, in *Norman* v. *Norman*,[137] Steinberg U.F.C.J. declined to grant an order declaring a marriage null and void due to an elderly husband's inability to consummate the marriage. The

---

[132] S. Fodden, and J. David Fine, "Annulment of Marriage for Impotence in the Common Law of Canada" (1973) 8 R.F.L. 129.

[133] *D.* v. *D.*, [1973] 3 O.R. 82 (H.C.).

[134] Fodden, *supra* note 132; *De Reneville* v. *De Reneville*, [1948] 1 All E.R. 56.

[135] *Tice* v. *Tice*, [1937] O.R. 233, aff'd [1937] 2 D.L.R. 591 (C.A.).

[136] [1953] 2 D.L.R. 318.

[137] (1979), 9 R.F.L. (2d) 235 (Ont U.F.C.).

applicant wife acknowledged that her principal motivation for entering into the marriage was companionship, and that she had not had an expectation of sexual relations. The Court termed the relationship a "platonic marriage" and maintained its validity.

As one author has noted, the existing jurisprudence permits all opposite-sex couples to marry regardless of procreative capacity or willingness to have children, and excludes all same-sex couples even if they have already procreated or if they are willing to do so.[138] Such an approach is not carefully constructed to foster procreation and is inconsistent with the goal of providing a supportive and stable environment in which to raise children.

(e) The changing nature of marriage

In considering the scope of the common law rule, it must be recognized that marriage has demonstrated its capacity to evolve over time so as to better accommodate the requirements of equality.

It is not only in relation to same-sex couples, for example, that procreation has been advanced to justify a denial of the right to marry. At one time, procreation was used as a rationale to maintain anti-miscegenation statutes.[139] In *State* v. *Jackson*, the Court commented:

> It is stated as a well authenticated fact that if the issue of a black man and a white woman and a white man and a black woman, intermarry, they cannot possibly have any progeny, and such a fact sufficiently justifies those laws which forbid the intermarriage of blacks and whites...[140]

---

[138] Robert Wintemute, "Sexual Orientation Discrimination as Sex Discrimination: Same-Sex Couples and the Charter in *Mossop, Egan* and *Layland*" (1994) 39 McGill L.J. 429 at 433.

[139] See H. M. Applebaum, *Miscegenation Statutes: A Constitutional and Social Problem*, (1964) 53 Geo. L.J. 49.

[140] 80 Mo. 175 at 179 (1883); cited in Applebaum, *Ibid.* at note 108.

Similar views were expressed in *Scott* v. *State*:

> Our daily observation shows us, that the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength to the full blood of either race.[141]

In *Naim* v. *Naim*,[142] it was considered that the State of Virginia had a legitimate purpose in maintaining anti miscegenation statutes in order to, *inter alia*, "preserve the racial integrity of its citizens", prevent "the corruption of blood", avoid a "mongrel breed of citizens" and the "obliteration of racial pride".

Ultimately, however, the United States Supreme Court in *Loving* v. *Virginia*,[143] struck down Virginia's anti-miscegenation laws, and affirmed marriage as a fundamental institution premised on principles of equality. The judge at first instance had commuted the Lovings' sentence from 1 year in prison to exile from the State of Virginia, commenting:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.[144]

At the Supreme Court, Warren CJC, writing for the majority, stated:

> There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. ... We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race...Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival [*Skinner v Oklahoma*, 316 US 535]...To deny this fundamental freedom on so unsupportable a basis as the racial classification embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law.[145]

---

[141] 39 Ga. 321 at 323 (1869); cited in Applebaum, *Ibid.* at note 108.

[142] 87 S.E. 2d. 749 at 756 (1955).

[143] 18 L. Ed. 2d. 1012 (U.S.S.C.).

[144] Cited *Ibid.* at 1013.

[145] *Ibid.* at 1017.

Similar changes have taken place with respect to women's equality. In the early case of *Durham* v. *Durham*,[146] the Court defined marriage by reference to "the natural relations which spring from that engagement, such as protection on the part of the man, and submission on the part of the woman." Similarly, Blackstone described the legal status of a married woman as follows:

> By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs every thing.

This passage was cited by the Supreme Court of Canada in *R.* v. *Salituro*[147] to demonstrate the extent to which the nature of marriage has changed.

Greer J., in dissent in *Layland*, also recognized the developing nature of the common law in the context of marriage rights for same-sex couples, saying:

> There was even a time in history when a woman became the property of her husband. ... The common law and legislated law both change to meet a changing society.[148]

In modern times, marriage is recognised as a partnership between equals. This is reflected in statutes like the Ontario *Family Law Act*,[149] the preamble to which states:

> ...it is necessary to recognize the equal position of spouses as individuals within marriage and to recognize marriage as a form of partnership...

---

[146] (1885), 10 P.D. 80 at 82.

[147] *Supra* note 126 at 671-72.

[148] *Supra* note 58 at 236-237.

[149] R.S.O. 1990, c. F.3.

Similarly, the preamble to Manitoba's *Marital Property Act*[150] provides:

> Whereas marriage is an institution of shared responsibilities and obligations between parties recognized as enjoying equal rights;

The changing focus of marriage to an institution of mutual support is further articulated in the Supreme Court of Canada decision in *Moge* v. *Moge*,[151] in which L'Heureux-Dubé J. writes:

> Marriage may be unquestionably a source of benefit to both parties that is not easily quantified in economic terms. Many believe that marriage and the family provide for the emotional, economic, and social well-being of its members. It may be the location of safety and comfort, and may be the place where its members have their most intimate social contact. Marriage and the family act as an emotional and economic support system as well as a forum for intimacy. In this regard, it serves vital personal interests and may be linked to building a 'comprehensive sense' of personhood.[152]

Just as marriage has adapted to reflect the needs of gender and racial equality, so too it is possible that the presumed prohibition in federal common law against equal marriage rights for same-sex couples may be revisited by the judiciary as part of the natural evolution of the common law.

---

[150] R.S.M. 1987 c. M45.

[151] [1992] 3 S.C.R. 813.

[152] *Ibid.* at 848.

B. Constitutionality of Provincial Restrictions on Marriage for Same-sex Couples

1. Introduction

Given that capacity to marry falls exclusively within federal jurisdiction, the constitutionality of those provincial laws that also purport to address the gender requirements of marriage is open to question.

In relation to gender requirements, provincial laws dealing with marriage fall into five main categories:

(a) Laws which are gender-neutral or contain no restriction on marriage for same-sex couples;

(b) Laws which reference or link with federal requirements;

(c) Laws which contain gendered language which implicitly restricts marriage to opposite-sex couples only;

(d) Laws which maintain explicit prohibitions on marriage for same-sex couples;

(e) Laws which maintain explicit prohibitions on marriage for same-sex couples, and also invoke the constitutional "notwithstanding" clause in an effort to bar judicial scrutiny of the legislation's constitutionality.

It should be noted, however, that these categories are not mutually exclusive. The following chart summarizes the categories into which the marriage legislation of each province and territory falls:

Jurisdiction	(a) gender-neutral	(b) link with federal requirements	(c) gendered language	(d) explicit same-sex prohibition	(e) use of notwithstanding clause
BC	✓	✓			
AB				✓	✓
SK		✓	✓		
MB	✓	✓			
ON		✓	✓		
QC				✓	
NB		✓			
NS		✓	✓		
PEI			✓		
NFLD		✓	✓		
YT	✓	✓			
NWT	✓	✓			
NUNAVUT	✓	✓			

2. Categories of provincial law

The constitutionality of each of the different classes of law requires consideration.

(a) Laws which are gender-neutral or contain no restriction on marriage for same-sex couples

A number of provinces maintain legislation which uses language like "husband" or "wife" but does not explicitly require that couples be of opposite-sex. For example, s. 7(3) of the Manitoba legislation provides:

> s. 7(3) No particular form of ceremony is required in a ceremony of marriage solemnized by a marriage commissioner except that in some part of the ceremony, and in the presence of witnesses and of the marriage commissioner, each of the parties shall declare, 'I do solemnly declare that I do not know of any lawful impediment why I, AB, may not be joined in matrimony to CD' and each of the parties shall say to the other, 'I call upon these persons here present to witness that I, AB, do take thee, CD, to be my lawful wedded wife (or husband).'[153]

This contemplates that the parties declare themselves to be each other's wife "or" husband, but does not explicitly require that both participants be of opposite sex. Two lesbians who declare

[153] *Marriage Act*, R.S.M. 1987, c. M-50.

themselves each other's wife would not, on the face of it, be violating the requirements of s. 7(3). Section 8(1) of the legislation refers to a marriage between "two persons".[154]

Similar language is used in the legislation of British Columbia,[155] the Yukon Territory,[156] the Northwest Territories[157] and Nunavut.[158]

It is probable that, in enacting legislation that is gender-neutral but contains language such as "husband" or "wife", the provincial Legislature assumed that parties to a marriage would be of the opposite sex, but nothing in the legislation itself prescribes any gender requirement. Clearly, there is no jurisdictional difficulty with the marriage laws of those provinces that maintain gender-neutral terminology. They do not purport to impose restrictions on the gender of the parties or to usurp federal jurisdiction over capacity to marry. Should federal law permit same-sex couples to marry, these provincial statutes will remain consistent with federal law.

(b) Laws that reference or link with federal requirements

The marriage legislation of New Brunswick provides a good example of a law that references capacity to marry, without itself attempting to impose restrictions on capacity. Section 3 of the *Marriage Act* provides:

> s. 3. A clerk of the Court may solemnize the ceremony of marriage between any two persons not under a legal disqualification to contract such marriage...[159]

---

[154] Sections 2 and 29 also overlap with category (b) by referring to marriage between persons "not under a legal disqualification to contract such a marriage."

[155] *Marriage Act*, R.S.B.C. 1996, c. 282, s. 20. Section 7(1) also refers to marriage "between any 2 persons neither of whom is under a legal disqualification to contract marriage".

[156] *Marriage Act*, R.S.Y. 1986, c. 110, s. 13(b). Section 7(1) also refers to marriage "between persons not under a legal disqualification to contract marriage."

[157] *Marriage Act*, R.S.N.T. 1988, c. M-4, s. 13(b). Section 7(1) also refers to marriage "between persons not under a legal disqualification to contract marriage."

[158] All laws of the Northwest Territories were carried over to Nunavut in their then current form when the new territory formed.

[159] R.S.N.B 1996, c. M-3. Section 2 also refers to the solemnization of marriage "between any two persons who are lawfully entitled to contract that marriage".

Section 16 then sets out a list of requirements for the issuance of a marriage licence, including that affidavits be provided to the registrar stating, *inter alia*, "(b) that he or she believes there is no affinity, consanguinity, prior marriage or other legal impediment to bar or hinder the solemnization of the marriage..."

These sections do not refer specifically to the gender of the parties, but do incorporate a requirement that there be no "legal disqualification" or "legal impediment" to the marriage.

The marriage statutes of British Columbia, Manitoba, the Yukon Territory, the Northwest Territories and Nunavut all contain similar provisions requiring the absence of a legal disqualification coupled with gender-neutral terminology,[160] while the marriage statutes of Saskatchewan, Ontario, Nova Scotia and Newfoundland contain such a provision coupled with gendered language.[161]

Provisions which do not themselves prescribe restrictions on capacity to marry, but only require marriage applicants to assert that there is no legal impediment to the marriage, are *clearly intra vires*. These provisions are sufficiently flexible to incorporate developments in jurisprudence regarding the capacity of same-sex couples to marry without requiring further amendment.

---

[160] *Supra* notes 153 to 158.

[161] See *infra* notes 162 to 165.

(c) Laws that contain gendered language that implicitly restricts marriage to opposite-sex couples only

Some statutes contain gendered language that appears to restrict marriage to opposite-sex couples. For example, s. 11 of the Newfoundland *Solemnization of Marriage Act*[162] provides:

> s. 11(1) A particular form of ceremony is not required in a marriage that is solemnized by a marriage commissioner, except that in some part of the ceremony, in the presence of the marriage commissioner and witnesses, each of the parties to the marriage...shall say to each other: "I call upon persons present to witness that I, AB, take you CD, to be my lawful wedded wife (or husband)", after which the marriage commissioner shall say: "By the authority vested in me by the Solemnization of Marriage Act, I pronounce you, AB and CD, to be husband and wife."

While the parties are only required to declare themselves each other's wife "or" husband, the marriage commissioner is required to pronounce the couple husband "and" wife.

A similar provision is included in the equivalent legislation of Nova Scotia,[163] Saskatchewan,[164] Ontario[165] and Prince Edward Island.[166] These sections appear to set out, as a legal requirement of the ceremony, the pronouncement that the parties to the marriage be of opposite genders.

By analogy with the consanguinity cases, provincial enactments that use gendered language to imply that parties to a marriage must be of opposite sex are probably *intra vires* provided that

---

[162] R.S.N. 1990, c. S-19. Section 15(1)(b) of Newfoundland's legislation also requires a person applying for a licence to make an affidavit declaring that he or she believes "there is no affinity, consanguinity, prior marriage, or other lawful cause or legal impediment to bar or hinder the solemnization of the marriage".

[163] *Solemnization of Marriage Act*, R.S.N.S. 1989, c. 436, s.23(2). Section 17(1)(b) also requires an affidavit that the person applying for a licence believes there is no "lawful cause" or "legal impediment" to bar or hinder solemnization of the marriage.

[164] *Marriage Act, 1995*, S.S. 1998, c. M-4.1, s. 31 (b). Section 3 also provides for solemnization of a marriage between persons "not under a legal disqualification to contract marriage".

[165] *Marriage Act*, R.S.O. 1990, c. M.3. In *Layland*, however, the Court appeared to accept that the Ontario legislation "makes no reference to sexual orientation", *supra* note 58 at 226. Interestingly, it is under the absolute discretion of the Minister in Ontario to issue a license notwithstanding any contraventions of the *Act* (s. 10). Presumably, however, this discretion would only extend to matters which are themselves legitimately within provincial competence.

[166] *Marriage Act*, R.S.P.E.I. 1988, c. M-3, s. 10(2).

they are compatible with federal law. Courts are likely to read the legislation as merely reflecting the current state of federal common law, rather than as itself creating a legal restriction on capacity to marry.

As with the consanguinity cases, however, these laws would be considered invalid under the paramountcy principle should there be an inconsistency with federal law. This could happen in a number of ways:

- The Courts could reconsider the scope of federal common law to permit same-sex couples to marry;
- The common law restriction could be successfully challenged as inconsistent with the equality guarantees in the *Charter of Rights*;
- A future federal statute restricting marriage to opposite-sex couples could be successfully challenged as inconsistent with the equality guarantees in the *Charter of Rights*;
- A future federal statute could permit same-sex couples to marry.

(d) Laws that maintain explicit prohibitions on marriage for same-sex couples

Both Quebec and Alberta maintain an explicit prohibition on marriage for same-sex couples. Because Alberta's legislation also incorporates the constitutional "notwithstanding" clause, it will be considered separately in the next section.

The *Quebec Civil Code* contains a section on the family, with a subsection on marriage:[167]

> Article 365: Marriage shall be contracted openly, in the presence of two witnesses, before a competent officiant. Marriage may be contracted only between a man and a woman expressing openly their free and enlightened consent.

[167] *Code Civil du Quebec*, 1995 (3e edition), Les Editions Yvon Blais.

Article 365 on its clear terms purports to restrict marriage to opposite-sex couples. The article is currently under constitutional challenge in the case of *Hendricks & LeBoeuf* v. *Procureur général du Québec.*[168]

Explicit provincial prohibitions on marriage for same-sex couples are extremely difficult to defend constitutionally, since they appear to squarely violate the exclusive jurisdiction of Parliament to impose restrictions on capacity to marry. They are not readily classified as preliminary, necessarily incidental or merely ancillary to the valid provincial jurisdiction over solemnization of marriage. Unlike the previous category of statute, where gendered language is used almost in passing, the offending provisions cannot be merely "read down" by the Courts, since the opposite-sex requirement is an explicit and integral component of the section.

If the prohibition were framed as merely procedural, i.e. that no license shall be issued where the parties are of the same sex, an argument for provincial jurisdiction could be advanced, based on the cases dealing with provincial age restrictions. However, as noted above, the provincial assertion of jurisdiction over age has been severely criticized as inconsistent with proper constitutional interpretation.[169] Further, unlike age, which is only a temporary restriction, the opposite-sex restriction would permanently prohibit the marriage of same-sex couples.

Any provincial restriction would also, of course, be subject to the doctrine of paramountcy of federal law, including federal common law. The weight of authority supports the view that should federal common law permit same-sex couples to marry, any provincial law that would otherwise be upheld would be *ultra vires*.

---

[168] *Supra* note 95.

[169] See Katz, *supra* note 66.

(e) Laws that maintain explicit prohibitions on marriage for same-sex couples, and also invoke the constitutional "notwithstanding" clause in an effort to bar judicial scrutiny of the legislation's constitutionality

The Alberta Legislature has recently enacted a Bill which purports to restrict marriage to opposite-sex couples. Bill 202 was introduced on February 23, 2000, and received Royal Assent on March 23, 2000. The Preamble to the Bill declares that it is designed to maintain marriage "in its purity", and continues:

> WHEREAS marriage between a man and woman has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long standing philosophical and religious traditions;

The Bill then amends the *Marriage Act*,[170] to add a new s. 1(c.1), providing:

> '"marriage" means a marriage between a man and a woman;'

The debates around the Bill make it clear that the sole purpose of this proposed legislation is to explicitly ensure that gay and lesbian couples are denied the ability to marry. As a result, the law would be nearly impossible to defend constitutionally, since it has been enacted independently of, and is wholly unrelated to, the existing provincial legislation dealing with solemnization of marriage. The Preamble to Bill 202 ends with the unconvincing assertion that "these principles are fundamental in considering the solemnization of marriage". This appears to be an attempt to categorize the restriction on capacity as part of provincial jurisdiction over solemnization of marriage, but it is clear under the colourability doctrine that a legislature cannot defend legislation by asserting jurisdiction it does not have or by purporting to invoke its legitimate authority over a particular subject matter.

---

[170] S.A. 1999, c. M-6.

Uniquely in all of Canada, the Bill invokes the constitutional "notwithstanding" clause, in an effort to prevent the courts from reviewing its constitutional validity. While the notwithstanding clause has the effect of protecting legislation from challenge under the *Charter of Rights* (subject to the requirement that the legislation be re-enacted every five years), it is irrelevant when considering whether Alberta has jurisdiction to restrict capacity to marry under a division of powers analysis. Alberta has no legislative competence to enact laws in fields outside its constitutional jurisdiction, and the notwithstanding clause (which on its express terms only enables a government to "opt out" of s. 2 or ss. 7 to 15 of the *Charter*) cannot validate legislation that a province has no jurisdiction to enact.

PART FOUR

OPTIONS FOR REFORM

Both federal and provincial governments are reviewing options for reform, in an effort to bring laws dealing with relationships better into conformity with the requirements of the *Charter* and the actual needs of modern family structures.

This section will examine some of the different approaches adopted by Canadian legislators, as well as the jurisdictional implications of various policy choices.

I. Statutes vs Incidents of Marriage

In considering options for reform, it must be recognized that marriage means different things to different people. Two of the primary components of marriage include:

- the incidents of marriage, i.e. the bundle of rights and responsibilities which are attached to the institution itself, and which are made available only to those couples who are legally permitted to marry; and
- the status of marriage, which confers legitimacy and public recognition on certain kinds of relationships.

Both elements need to be considered to properly appreciate the advantages and limitations of the available law reform options.

II. Extending the Incidents of Marriage

As a result of the combined effect of the Supreme Court decision in *M.* v. *H.*[171] that the opposite-sex definition of spouse in the support provisions of Ontario's *Family Law Act* is unconstitutional, and the ruling in *Miron* v. *Trudel*[172] that maintaining discriminatory distinctions between married and unmarried couples cannot be justified, we may expect that the rights and responsibilities which have hitherto been reserved for exclusively married opposite-sex couples will increasingly become available to both same-sex couples and unmarried opposite-sex couples. As Greer J. (dissenting) noted in *Layland*:

> A case by case analysis seems to indicate that the courts, in expanding rights and equalities by applying the *Charter* to read out words of legislation which offend the rights of gays and lesbians as protected by the *Charter*, are providing them piece by piece with benefits which would all be granted to them under the umbrella of 'marriage'.[173]

In recent years, we have seen governments across Canada gradually extend to same-sex couples many of the rights and responsibilities of marriage. In so doing, a number of different approaches have emerged.

---

[171] (1999), 171 D.L.R. (4th) 577 (S.C.C.); [1999] 2 S.C.R. 3.

[172] [1995] 2 S.C.R. 418.

[173] *Supra* note 58 at 234-35.

A. The Federal Approach

1. Bill C-78: Same-sex Survivor Benefits

In its amendment to the *Public Service Superannuation Act*,[174] the federal government used new gender-neutral terminology to encompass both same-sex and opposite-sex couples for the purpose of survivor benefits, replacing the term "surviving spouse" with the term "survivor".

2. Bill C-23: Modernizing Benefits and Obligations

The omnibus legislation simultaneously extends to same-sex couples the rights and responsibilities of opposite-sex common law couples, while also conferring on common law couples (both same-sex and opposite-sex) virtually all the rights and responsibilities of married couples.[175] Under the Bill, relationship rights and responsibilities will attach to any couple living in a conjugal relationship for a period of one year. In this regard, the Bill goes further than the omnibus legislation adopted by each of Quebec and Ontario, which accorded same-sex couples the rights and responsibilities of opposite-sex common law couples but not any of the rights and responsibilities of married couples.

Unmarried couples are identified by the phrase "common law partner" or, in French, "conjoint de fait". Although "spousal" terminology is only used for married couples, identical terminology is applied to both same-sex and opposite-sex common law partners. The French terminology "conjoint de fait" corresponds with the phrase commonly used to describe heterosexual common law partners. Both same-sex and opposite-sex relationships are recognized as "conjugal".

---

[174] Bill C-78, which received Royal Assent on September 14, 1999.

[175] See discussion, *supra* in Part Three, Section II.A.1 for further details.

Despite the difference in terminology between married couples and unmarried (same-sex and opposite-sex) couples, the Bill has been hailed by its supporters as a significant step towards full legal equality for those in same-sex relationships, while simultaneously being denounced by its detractors as the "*Death of Marriage Act*":

> If this Bill passes, the institution of marriage will be the next casualty of gay and lesbian lobby groups and weak-kneed politicians.
>
> ... In the 1950s, buggery was a criminal offence, now it's a requirement to receive benefits from the federal government.[176]

A further policy issue raised during debates around Bill C-23 was whether federal benefits and obligations should be extended only to conjugal relationships or made available more broadly to non-conjugal relationships such as siblings, aunts, uncles and other relatives, caregivers etc. Minister of Justice Anne McLellan, testifying before the House of Commons Standing Committee on Justice and Human Rights, explained the government's policy reasons for not adopting that course at this time, while affirming that the government is not closed to extending benefits and obligations to a broader class of interdependent relationships in future:

> The reality is that many adult Canadians currently reside with elderly parents, siblings or other relatives. However, there is a qualitative difference between the relationships addressed in Bill C-23 and the types of relationships that may exist among relatives, siblings or friends living under the same roof and sharing household expenses.
>
> While benefits that reflect dependency would likely be welcome, it is unclear whether the accompanying legal obligations would be equally well received. Take the case of an elderly woman living with her son and daughter-in-law. Should the younger couple's combined income be included in the senior citizen's calculations of her eligibility for the Guaranteed Income Supplement under the *Old Age Security Act*?
>
> What about the question of whether recognition of dependency should be limited to any two unmarried persons? Consider the example of adult children caring for elderly parents in their homes. In one case, a daughter supports her widowed father. In the house next door, another woman provides for both her mother and father. Should both be treated equally? Should relationships of dependency apply to any two people who live together, or to unlimited numbers as long as they are under the same roof?

---

[176] "Breitkreuz renames Bill C-23 the *Death of Marriage Act*", Press Release, Reform M.P. Garry Breitkreuz, March 2, 2000.

> Other issues also need to be resolved. These include how dependency relationships would be defined and which relationships would be allowed. Would individuals be allowed to self-declare their relationships, or would the government require proof of some kind? Would the government exclude any relatives from this class, as France has done, or exclude only opposite-sex common-law couples, as Hawaii has chosen to do? ...
>
> These, colleagues, are not trivial issues and they are not amenable to easy answers. We would be essentially creating new legal relationships that would attract benefits and obligations, and we would not want to do that without a great deal of further study to assess the implications for our society.
>
> This government believes that we want our laws to encourage families to take care of each other. If we were to change the law in this area, we could accidentally discourage people from taking care of each other because they were concerned that they might be subject to later legal obligations and obviously legal action of one sort or another. Instead of facilitating caring, we could end up encouraging the opposite.[177]

Ultimately, the Minister pledged to refer the question of broader relationships of interdependency to a House Committee for public consultations and further study, while proceeding in the meantime with Bill C-23.

B. The Quebec Approach

1. Bill 32

Bill 32[178] was unanimously adopted by the National Assembly of Quebec. The Bill takes an omnibus approach, amending the definition of "spouse" in some 39 statutes and regulations, to place same-sex couples in the same position as opposite-sex unmarried couples. It is an attempt to harmonize the definition of spouse and to include same-sex couples within that definition in laws relating to such issues as pensions, automobile and health insurance and employment rights.

---

[177] Hansard, *Standing Committee on Justice and Human Rights* (February 29, 2000) at paras. 1555–1600.

[178] *An Act to amend various legislative provisions concerning de facto spouses*, 1st Sess., 36th Leg., Quebec. S.Q. 1999, c. 14, assented to 16 June 1999.

The Bill maintains consistent terminology for both same-sex and opposite-sex couples, and (unlike the federal and Ontario approaches) does not shrink from using "spousal" terminology. It does, however, only treat same-sex couples as equivalent to opposite-sex unmarried couples, maintaining a distinction between married and unmarried couples.

C. The Ontario Approach

1. Bill 5

In October 1999, Ontario responded to the *M* v. *H* decision by enacting Bill 5, "*an Act to amend certain statutes because of the Supreme Court of Canada decision in M.* v. *H.*"[179] This Bill extends some 67 provincial statutes to provide same-sex couples with many of the rights and responsibilities of unmarried opposite-sex couples. Bill 5 therefore continues to withhold those benefits and responsibilities available to married heterosexuals.

In addition, Bill 5 has attracted widespread criticism for restricting the definition of 'spouse' to opposite-sex couples only, while setting up a separate definition for same-sex 'partners' ("partenaires de même sexe"). Throughout Ontario law dealing with *de facto* couples, the Bill strikes out the word "spouse" and substitutes the words "spouse or same-sex partner". In addition, the word "family" is replaced in many statutes by the word "household". The prohibited ground of discrimination "marital status" in Ontario's *Human Rights Code* is modified by adding the new ground "same-sex partnership status" for those in same-sex relationships.

---

[179] Bill 5, S.O. 1999, c. 6.

It appears that the intent behind creating new terminology exclusively for same-sex couples was to reinforce the view of the Ontario government that same-sex couples are not spouses, do not form families and do not have a marital status. This is acknowledged in the Attorney General for Ontario's speech at second reading of the Bill, in which he stated:

> I stress that the Bill reserves the definition of 'spouse' and 'marital status' for a man and a woman, the traditional definition of 'family' in Ontario. The Bill introduces into the law the new term called 'same-sex partner', while at the same time protecting the traditional definitions of 'spouse' and 'marital status'. ...
>
> This Bill responds to the Supreme Court ruling while preserving the traditional values of family in Ontario.[180]

The Bill received first reading on October 25, 1999, second reading on October 27, 1999, third reading on October 27, 1999, and Royal Assent on October 28, 1999.

A motion for a rehearing of the *M.* v. *H.* case was filed before the Supreme Court of Canada, on the basis that the differential terminology adopted by Ontario fails to comply with the *Charter of Rights* and the Supreme Court's ruling in *M.* v. *H.*[181] This motion was, however, denied by the Supreme Court of Canada on May 25, 2000. The denial of the motion does not preclude an independent challenge to Bill 5 before a court of first instance.

D. The British Columbia Approach

British Columbia has, over the years, extended spousal rights to same-sex couples in laws dealing with such diverse issues as guardianship, medical decision-making, spousal support, pension rights, adoption, and inheritance rights. As in Quebec, these changes have been

---

[180] Legislative Assembly, *Ontario Hansard* (27 October 1999) at 1830-1840.

[181] Notice of Motion, S.C.C. No. 25838, April 11, 2000.

brought about through amendments to the definition of "spouse", although in a piecemeal rather than omnibus fashion.

A number of significant laws to recognize same-sex couples equally have been introduced in recent years, including the *Family Relations Amendment Act 1997*,[182] the *Pensions Statute Amendment Act (No. 2) 1998*,[183] the *Pension Benefits Standards Amendment Act, 1999*,[184] the *Definition of Spouse Amendment Act, 1999* and the *Definition of Spouse Amendment Act, 2000*.[185]

The Ministry of the Attorney General also engaged the British Columbia Law Institute to undertake a project on spousal relationships that consisted of a review and assessment of all references in the provincial statute books to "spouse," "husband" or "wife" (and other words denoting these kinds of relationships) to determine whether they are consistent with the principles endorsed by the legislature in the *Family Relations Amendment Act.*

The British Columbia Law Institute was further tasked to "make recommendations for legislative changes necessary to provide legal recognition to the variety of family relationships in the province, and to address the rights and obligations that should attach to those relationships."[186] Among the recommendations of the Institute was the creation of a system of Registered Domestic Partnerships, a law reform option that is further discussed below.

---

[182] S.B.C. 1997, c. 20, in force effective February 4, 1998.

[183] S.B.C. 1998, c. 40.

[184] S.B.C. 1999 c. 41 - Bill 58.

[185] S.B.C. 1999, c.29 and S.B.C. 2000, c.24.

[186] Executive Summary, Report on Recognition of Spousal and Family Status, <http://www.bcli.org>.

E. Registered Domestic Partnerships

Domestic partnership laws would confer upon those who choose to register their relationships certain rights and responsibilities. They could be constructed so as to be available to all conjugal relationships, only to those in same-sex relationships as a functional alternative to marriage, or to both conjugal and non-conjugal relationships. Registration might confer on couples all the rights and responsibilities of marriage, only the rights and responsibilities available to opposite-sex unmarried couples, or almost any combination of rights and responsibilities. A further question is whether couples who choose not to register their relationships would still be recognized *de facto* by the law in certain circumstances, in the same manner that opposite-sex couples who choose not to marry are legally recognized as common law couples in many circumstances.

The experience internationally has been that many domestic partnership laws are not as extensive as marriage in the rights and obligations they confer. A recent Law Commission-sponsored conference at Queen's University examined in detail international comparisons of domestic partnership laws, as well as the advantages and disadvantages of different approaches. As noted by Prof. Bala, "concerns about consistency, certainty, fairness and efficiency all support enactment of RDP [registered domestic partnership] legislation."[187]

Similarly, in recommending the enactment of domestic partnership legislation, the British Columbia Law Institute indicated that it was guided by a variety of principles, including "protection of relationships based upon personal choice, non-discrimination in access to social

[187] Program and Conference Papers, Domestic Partnerships Conference, Queen's University, sponsored in part by Law Commission of Canada, 21-23 October 1999 at 198.

status, voluntariness, protection of the vulnerable, protection of expectations, equity in distribution of benefits, equality among family relationships [and] protection of privacy."[188]

Some of the complicating factors surrounding domestic partnership registries were, however, adverted to by Minister of Justice Anne McLellan in her evidence before the House of Commons Standing Committee on Justice and Human Rights on Bill C-23:

> The possibility of creating a domestic partnership registry is also of some interest and is related to the issue that I've just discussed. However, there are several concerns with a registry that would also require further study. Proceeding down this path requires discussion with those likely to be affected, an assessment of costs, and discussions with the provinces.
>
> Moreover, it is not clear that voluntary registries are the best solution. What happens when a clear dependency exists but one partner refuses to register in order to avoid obligations? If couples can register, under what circumstances can they deregister? What if only one of the partners wishes to do so?
>
> There are also privacy issues to consider. Presumably a registry would be open to the public in the same way as registries are for births and deaths. This might result in people being forced to have their relationships publicly known.[189]

Another concern with registered domestic partnerships is their lack of portability. Although other jurisdictions might consider them as evidence of the nature of the relationship, it is unlikely that the status would be directly recognized, nor all the rights and obligations that accompany that status. Finally, it is open to question whether domestic partnership registries confer equal status with marriage, or whether by setting up a separate regime, they reinforce inequality of status between married couples and those couples prohibited from marrying.

---

[188] *Supra* note 186.

[189] *Supra* note 177 at para. 1555.

III. Extending the Status of Marriage

It should be noted that, notwithstanding all the alternative approaches outlined in the previous section, extending the incidents of marriage but restricting access to the institution itself to heterosexuals will inevitably be seen by members of the lesbian and gay communities as the maintenance of a discriminatory regime.

Although not all would choose to marry, as marital rights and obligations are extended to relationships previously excluded, marriage is likely to become less about access to the concrete benefits associated with the institution and more about access to the institution itself. Without its accoutrements, marriage will remain a status, a symbol of state legitimacy, and for that reason alone is likely to remain attractive to those such as same-sex couples, whose legitimacy has previously been called into question by discriminatory laws. Allowing same-sex couples to marry will not only be desired by those couples who want such recognition, but will also help reduce the stigma of homosexuality and increase the acceptance of same-sex relationships as being equally valuable and worthy of celebration. It is exactly this symbolic importance that has brought about such fierce opposition by those who seek to maintain the moral condemnation of homosexuality.

Canadian Courts have already called into question the legitimacy of attempts by governments to set up alternative, separate regimes for those in same-sex relationships. In *Attorney General of Canada* v. *Moore & Akerstrom*[190] it was held that that the federal government had violated the *Canadian Human Rights Act* by attempting to set up a separate provision for "same-sex

[190] [1998] 4 F.C. 585 (F.C.T.D.), per MacKay J.

partners", who would receive the same benefits as "common law spouses". The Federal Court ruled that:

> ... such an approach is discriminatory within the meaning of the *Canadian Human Rights Act*. In my view, the scheme proposed by the employer establishes a regime of 'separate but equal', one that distinguishes between relationships on the basis of the sexual orientation of the participants. Thus, this scheme remains discriminatory. ...
>
> In my view, on the facts of the case at bar, the employer's separate definition of same-sex partners, made without explanation, reinforces a distinction drawn between same-sex and heterosexual couples, one made typically on discriminatory grounds. Such a distinction [relies] on classifications reflecting pre-existing biases without a plausible non-discriminatory rationale ... [I]t is no more appropriate for the employer in this case to have established a separate definition for persons in same-sex relationships than it would be for an employer to create separate definitions for relationships of persons based on their race, colour or ethnicity, or any other prohibited ground enumerated in the *Act*.[191]

The Court also cited with approval the comments of Linden J, in dissent, of the Federal Court of Appeal in *Egan*, in which Linden J. referred to the "separate but equal doctrine" as:

> ... a loathsome artifact of the similarly-situated approach. One cannot avoid the conclusion that offering benefits to gay and lesbian partners under a different scheme from heterosexual partners is a version of the separate but equal doctrine. That appalling doctrine must not be resuscitated in Canada 40 years after its much-heralded death in the United States.[192]

As the majority of the Supreme Court of Canada also recognized in the *Egan* case:

> The law confers a significant benefit by providing state recognition of the legitimacy of a particular status. The denial of that recognition may have a serious detrimental effect upon the sense of self-worth and dignity of members of a group because it stigmatizes them even though no economic loss is occasioned. This principle has been recognized in the cases of the U.S. Supreme Court dealing with the segregation of races.[193]

---

[191] *Ibid.* at 617, 621-622.

[192] [1993] 3 F.C. 401 at 442.

[193] *Supra* note 131 at 594.

In *Brown* v. *Board of Education*,[194] the U.S. Supreme Court ruled that racial segregation constituted discrimination "even though the physical facilities and other 'tangible' factors may be equal", stating:

> To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.[195]

Similarly, in M.'s application for a rehearing by the Supreme Court of Canada on the remedy adopted by the Ontario Government in enacting Bill 5, the Notice of Motion summarizes the legal challenge as follows:

> Segregated status has the discriminatory purpose and effect of perpetuating and promoting the view that the relationships of lesbians and gay men are inherently different from and inferior to those of heterosexuals. The government pretends compliance with the decision in *M.* v. *H.* by granting lesbians and gays many formally equivalent benefits and burdens, but persists in denying substantive equality's requirement of equal dignity, respect and consideration. This is the essence of discrimination.[196]

These same concerns are likely to apply to any attempt to maintain a status for same-sex couples separate from marriage. For example, in the recent marriage decision in Vermont,[197] the Court declared the prohibition on marriage for same-sex couples unconstitutional, but remitted the matter back to the State Legislature to consider the appropriate remedy. The Legislature decided to enact an alternative regime providing for "civil unions", with consequences nearly identical to marriage, but which is still seen by many as withholding the actual status and legitimacy of marriage from those in same-sex relationships.[198]

---

[194] 347 U.S. 483 (1954).

[195] *Ibid.* at 494.

[196] *Supra* note 181.

[197] *Baker* v. *State of Vermont* 744 A. 2d 864 (1999) (Vermont Sup. Ct.).

[198] One same-sex couple, for example, described the outcome as "bittersweet" and expressed disappointment at having to "stop short of the goal": "Vermont okays gay 'unions'" *Ottawa Citizen*, April 20, 2000, E8.

IV. Jurisdictional Issues Relating to Law Reform Options

In relation to the specific approaches adopted by the federal government and the governments of Ontario, Quebec and British Columbia, it is clear that each government has to date acted to amend its own laws within its field of legislative competence.

Interesting jurisdictional questions would arise, however, should a government seek to enact some form of civil union which "looked like" marriage, but was not. The Vermont civil union law provides a good example. As of July 2000, same-sex couples will be able to enter into a legal institution intended to be parallel to marriage. To obtain a civil union, parties must be at least 18 years old and not closely related by blood. They will be able to obtain from any town clerk a civil union license, which may then be "certified" by a justice of the peace or willing member of the clergy. Couples will receive a civil union certificate rather than a marriage certificate.

As a practical matter, the civil union status confers on parties to a civil union the identical protections and responsibilities under State law as are available to spouses in a marriage. This includes:[199] preferences for guardianship of and medical decision-making for an incapacitated partner; automatic inheritance rights; the right to leave work to care for an ill spouse; hospital visitation rights; control of a partner's body upon death; the right to be treated as an economic unit for tax purposes under state law, including the ability to transfer property to each other during life without tax consequences; greater access to family health insurance policies; the ability to obtain joint policies of insurance and joint credit; parentage rights; and the right to divorce (called a "dissolution") and to an ordered method for ascertaining property division as well as child custody and support. Not having the same status as marriage, however, same-sex

couples in a civil union would not be able to access the benefits available to married couples in States other than Vermont, nor to access federal benefits available to married couples.

In Canada, it is not clear whether Courts would view such a regime as relating in pith and substance to federal jurisdiction over marriage or in pith and substance to provincial jurisdiction over property and civil rights.

Similarly, some authors have suggested that provincial domestic partnership laws might be challenged as a "colourable attempt to invade the federal power over 'marriage' ", although the authors ultimately conclude that domestic partnership laws would be within the legislative competence of provincial governments.[200]

Minister of Justice Anne McLellan has argued that, in order for registered domestic partnerships to work, both the federal and provincial governments would need a comprehensive scheme, each with their own laws regulating such partnerships:

> Although the federal government could possibly create such a registry, its utility would be limited to laws in federal jurisdiction. To be effective in Canada, where the many pieces of legislation that grant benefits and impose obligations are divided between or shared among the federal, provincial and territorial governments, a registry would require the unanimous agreement of all levels of government on the relationships to be recognized.[201]

In his paper "Alternatives for Extending Spousal Status in Canada",[202] Prof. Bala observes that this complexity may be reason enough for the initiative not to be pursued, and instead suggests

---

[199] "Vermont House Gives Final Approval to Civil Union Bill", Gay & Lesbian Advocates & Defenders, Press Release, April 25, 2000.

[200] B. Cossman and B. Ryder, *Gay, Lesbian and Unmarried Heterosexual Couples and the Family Law Act: Accommodating a Diversity of Family Forms* (Ontario Law Reform Commission, 1993) at 218-19.

[201] *Supra* note 177 at para. 1555.

[202] *Supra* note 187.

that the simpler alternative would be for the federal government to allow same-sex couples to marry.

A related issue is the extent to which provincial jurisdiction over property and civil rights permits the provinces to differentiate in the allocation of legal rights and obligations depending upon marital status.

In the absence of the legal ability to marry, permissive provinces are currently able to exercise their legislative authority over property and civil rights to extend the legal rights and obligations associated with marriage to same-sex couples, even though the couple may be denied the legal status of marriage. Similarly, under a division of powers analysis, less permissive provinces are able to withhold from same-sex couples the property rights associated with marriage, although these laws are, of course, still subject to constitutional scrutiny under the equality guarantees of the *Charter*.

Should federal law be held to permit same-sex couples to marry, a couple so married would be married anywhere in Canada, since legal capacity to enter into a marriage is wholly within federal legislative authority, and cannot vary from province to province. While it is open to provinces to invalidate marriages that fail to meet provincial solemnization requirements, no province would have jurisdiction to use this power to restrict capacity to marry or to refuse to recognize a marriage solely on the basis that the celebrants were of the same sex. Attempts to restrict capacity in the guise of exercising a power over solemnization of marriage would probably be held to violate the 'colourability' doctrine.

However, many of the concomitant rights and responsibilities are matters of provincial jurisdiction, coming within the property and civil rights authority of the province. Accordingly,

while same-sex couples throughout Canada would have the capacity to enter into a marriage, their legal rights and obligations could vary across the provinces. In other words, permissive provinces would not distinguish between opposite-sex and same-sex married couples in allocating benefits and burdens within provincial jurisdiction, while less permissive provinces might seek to restrict the allocation of these benefits and burdens to opposite-sex couples, irrespective of a couple's marital status. Again, while such differentiation may be constitutionally permissible under a division of powers analysis, it would still be subject to judicial scrutiny for compliance with s. 15 of the *Charter*.

Demands for equality of status have continued to intensify in Canada in recent months. On May 26, 2000, Cynthia Callahan and her partner Judy Lightwater applied for a marriage licence in Victoria. The Attorney General of British Columbia indicated that the law was "uncertain" and the federal Marriage Act "ambiguous", and agreed to prepare a legal opinion on whether the marriage licence could be issued. The Attorney General also issued a written statement expressing the view that "[i]n a modern society there is no justification for denying same sex couples the same option to form marital bonds as are afforded to opposite sex couples." The Attorney General concluded:

> While it is possible to leave the issue of same sex marriages to be determined through years of litigation, it would be far better in my view for the federal government to resolve the matter by clarifying its legislation and offering same sex couples the same opportunity to marry as is available to opposite sex couples.[203]

The clearest means of providing equality of status in a manner consistent with the Constitution would be for Parliament to simply enact legislation enabling same-sex couples to marry.

---

[203] "Attorney-General's Statement on Same Sex Marriages", issued May 26, 2000.

PART FIVE

CONCLUSIONS

Governments and Courts alike have affirmed society's developing understanding of the diversity of family relationships, and laws are increasingly being fashioned to modernize the basis on which social benefits and obligations are allocated.

The provisions of the *Constitution Act* and existing case law relating to division of powers make it clear that questions of capacity to marry fall within exclusive federal jurisdiction. Those cases which appear to recognize provincial competence on matters relevant to capacity are all cautious to justify the exercise of provincial power by classifying the restriction as preliminary to the ceremony (e.g. age), procedural (e.g. validity of a marriage where no licence has been issued), necessarily incidental to some other matter within provincial competence (e.g. application of consanguinity requirements to adopted people) or not inconsistent with federal laws (e.g. provincial enactments relating to prohibited degrees of consanguinity which mirror the federal requirements). Where inconsistency with federal restrictions on a capacity issue arises (e.g. provincial enactments relating to prohibited degrees of consanguinity which go beyond the federal requirements), the provincial enactment has been held invalid.

Where the federal Parliament has not enacted legislation to address specific issues of capacity, these requirements may be derived from federal common law. In the context of same-sex relationships, courts have upheld the apparent common law restriction of marriage to opposite-sex couples. This may, however, be subject to change, either through judicial re-evaluation of the common law dealing with marriage or through a *Charter* challenge to the common law

restriction. Federal legislation to remove the restriction on marriage for same-sex couples seems unlikely, in view of consistent federal pronouncements affirming that marriage is restricted to opposite-sex couples only.

A number of Canadian laws, at both the federal and provincial levels, have been changed to extend to same-sex couples many of the rights and responsibilities of marriage. This first barrier to equality for same-sex couples has now effectively been overcome, through a combination of Court rulings and legislative action. Equality of status has not yet been recognized, however, and a number of governments to date have preferred to enact alternative terminology or statutory regimes, rather than directly treating same-sex couples equally with married couples or addressing the exclusion of same-sex couples from the institution of marriage.

Under a division of powers analysis, governments are able to amend specific laws within their fields of legislative competence to treat same-sex couples equally. More comprehensive alternative schemes may, however, be subject to constitutional challenge, particularly if the federal Parliament sought to set up an alternative regime to marriage, which might be considered by the Courts to relate in pith and substance more to the provincial jurisdiction over property and civil rights than to the federal jurisdiction over marriage. Similarly, attempts by some provinces (notably Quebec and Alberta) to prohibit same-sex couples from marrying will inevitably be considered unconstitutional as an attempt to usurp federal jurisdiction over capacity to marry.

These issues are even now before the Courts, and we may expect in years to come further clarification of these significant issues that go to the heart of Canada's shared legislative authority over marriage.

BIBLIOGRAPHY

Statutes & Bills

Bill 5, "*an Act to amend certain statutes because of the Supreme Court of Canada decision in M. v. H.*" S.O. 1999, c. 6.

Bill 32, *An Act to amend various legislative provisions concerning de facto spouses*, 1st Sess., 36th Leg., Quebec, S.Q. 1999, c. 14, assented to 16 June 1999.

Bill C-23, *The Modernization of Benefits and Obligations Act* (adopted by House of Commons, April 11, 2000).

Bill C-385, *An Act to Amend the Marriage (Prohibited Degrees) Act* (1st Sess., 36th Parl., 1997).

Child Welfare Act, R.S.A. 1980, c. 8.

Code Civil du Quebec, 1995 (3e edition), Les Editions Yvon Blais.

Constitution Act, 1867 (U.K.), 30 & 31 Victoria, c. 3.

Criminal Code of Canada, R.S.C. 1985, c. C-46.

Definition of Spouse Amendment Act, 1999, S.B.C. 1999, c. 29.

Definition of Spouse Amendment Act, 2000, S.B.C. 2000, c. 24.

Deserted Wives' and Children's Maintenance Act, R.S.O. 1970, c. 128.

Divorce Act, R.S.C. 1985 (2nd Supp.), c. 3, amended by R.S.C. 1985, c. 27 (2nd Supp.), s. 10 and S.C. 1990, c. 18.

Family Law Act, R.S.O. 1990, c. F.3.

Family Relations Amendment Act 1997, S.B.C. 1997, c. 20, in force effective February 4, 1998.

Marital Property Act, R.S.M. 1987, c. M45.

Marriage Act, R.S.A. 1970, c. 226.

Marriage Act, R.S.B.C. 1948, c. 201.

Marriage Act, R.S.B.C. 1979, c. 251.

Marriage Act, R.S.B.C. 1996, c. 282.

Marriage Act, R.S.C. 1906, c. 105.

Marriage Act, R.S.M. 1987, c. M-50.

R.S.N.B 1996, c. M-3.

Marriage Act, R.S.N.T. 1988, c. M-4.

Marriage Act, R.S.O. 1927, c. 181.

Marriage Act, R.S.O. 1937, c. 207.

Marriage Act, R.S.O. 1990, c. M.3.

Marriage Act, R.S.P.E.I. 1988, c. M-3.

Marriage Act, R.S.Y. 1986, c. 110.

Marriage Act, S.A. 1999, c. M-6.

Marriage Act, 1995, S.S. 1998, c. M-4.1.

Marriage (Prohibited Degrees) Act, S.C. 1990, c. 46.

Pension Benefits Standards Amendment Act, 1999, S.B.C. 1999 c. 41 - Bill 58.

Pensions Statute Amendment Act (No. 2) 1998, S.B.C. 1998, c. 40.

Public Service Superannuation Act Bill C-78, Royal Assent September 14, 1999.

Solemnization of Marriage Act, R.S.A. 1942, c. 303.

Solemnization of Marriage Act, R.S.N. 1990, c. S-19.

Solemnization of Marriage Act, R.S.N.S. 1989, c. 436.

Cases

A.-G. Alta. v. *A.-G. Can. (Alta. Bill of Rights)*, [1947] A.C. 503.

Attorney General of Canada v. *Moore & Akerstrom*, [1998] 4 F.C. 585 (F.C.T.D.).

Alberta (Attorney General) v. *Underwood*, [1934] S.C.R. 635.

Alspector v. *Alspector*, [1957] O.R. 454 (C.A.).

Ardasser Cursetjee v. *Perozeboye* (1856) 10 Moo. P.C. 375.

Bank of Montreal v. *Hall*, [1990] 1 S.C.R. 121.

Baker v. *State of Vermont* 744 A. 2d 864 (1999), (Vermont Sup. Ct).
Bisaillon v. *Keable*, [1983] 2 S.C.R. 60.

Brown v. *Board of Education*, 347 U.S. 483 (1954).

C.(L.) v. *C.(C.)* (1992), 10 O.R. (3d) 254.

Canadian Pioneer Management Ltd. v. *Saskatchewan (Labour Relations Board)*, [1980] 1 S.C.R. 433.

Cheni v. *Cheni*, [1962] 3 All E.R. 873 (P. Div.).

Communications & Electrical Workers of Canada v. *Canada (AG)*, [1988] F.C.J. No. 319 online: QL (CJ).

Construction Montcalm v. *Minimum Wage Commission*, [1979] 1 S.C.R. 754.

Corbett v. *Corbett (Ashley) (No. 2)* [1970] 2 All E.R. 33.

D. v. *D.*, [1973] 3 O.R. 82 (H.C.).

De Reneville v. *De Reneville*, [1948] 1 All E.R. 56.

Delgamuukw v. *British Columbia* (1993), 104 D.L.R. (4th) 470 (B.C.C.A.).

Durham v. *Durham*, (1885), 10 P.D. 80.

Egan v. *Canada*, [1993] 3 F.C. 401.

Egan v. *Canada*, [1995] 2 S.C.R. 513.

Foster v. *Foster*, [1953] 2 D.L.R. 318.

Fulton v. *Alberta (Energy Resources Conservation Board)*, [1981] 1 S.C.R. 153.

General Motors v. *City National Leasing*, [1989] 1 S.C.R. 641.

Gilham v. *Steele*, [1953] 2 D.L.R. 89 (B.C.C.A.).

Great Canadian Casino Co. Ltd. v. *Surrey (City)*, [1999] 3 W.W.R. 13 (B.C.S.C.).

Helens v. *Densmore*, [1957] S.C.R. 768.

Hendricks & LeBoeuf v. *Procureur général du Québec* (filed September 14, 1998, Cour supérieure du Québec).

Hobson v. *Gray* (1958), 13 D.L.R. (2d) 404 (Alta S.C.).

Hodge v. *The Queen*, [1883] 9 A.C. 117 (P.C.).

Hyde v. *Hyde & Woodmansee* (1866), L.R. 1 P&D 130.

Kerr v. *Kerr*, [1934] S.C.R. 72.

Layland v. *Ontario (Minister of Consumer & Commercial Relations)*, (1993), 14 O.R. (3d) 658; 104 D.L.R. (4th) 214 (Div. Ct.).

Legebokoff v. *Legebokoff et al* (1982), 136 D.L.R. (3d) 566.

Loving v. *Virginia* 18 L. Ed. 2d. 1012 (U.S.S.C.).

M. v. *H.* (1999), 171 D.L.R. (4th) 577 (S.C.C.); [1999] 2 S.C.R. 3.

M.T. v. *J.T.* 355 A. 2d 204 (1976).

M & D Farm Ltd. v. *Manitoba Agricultural Credit Corp*, [1999] 2 S.C.R. 961.

Meadow Creek Farms Ltd. v. *Surrey* (1978), 89 D.L.R. (3d) 47 (B.C.C.A.).

Miron v. *Trudel*, [1995] 2 S.C.R. 418.

Moge v. *Moge*, [1992] 3 S.C.R. 813.

Multiple Access v. *McCutcheon*, [1982] 2 S.C.R. 161.

Naim v. *Naim* 87 S.E. 2d. 749 (1955).

Natural Parents v. *British Columbia (Superintendent of Child Welfare)*, [1976] 2 S.C.R. 751.

Norman v. *Norman*, (1979), 9 R.F.L. (2d) 235 (Ont U.F.C.).

Propane Gas Association of Canada v. *North Vancouver* (1989), 42 M.P.L.R. 29 (B.C.S.C).

R. v. *Cogley* (1989), 41 A. Crim. R. 198.

R. v. *Harris and McGuinness* (1988), 17 N.S.W.L.R. 158.

R. v. *Lenart* (1998), 39 O.R. (3d) 55.

R. v. *Morgentaler*, [1993] 3 S.C.R. 463.

R. v. *Salituro*, [1991] 3 S.C.R. 654.

R. v. *Swain*, [1991] 1 S.C.R. 933.

Re Broddy et al. and Director of Vital Statistics, (1983), 142 D.L.R. (3d) 151 (Alta. C.A.).

Re Christians and Hill (1981), 123 D.L.R. (3d) 471 (Alta. Q.B.).

Re Goods and Services Tax, [1992] 2 S.C.R. 445.

Re Hassan and Hassan, (1976), 12 O.R. (2d) 432 (Ont. High Court of Justice).

Re the Marriage Law of Canada, [1912] A.C. 880 (P.C.).

Re North et al. and Matheson (1974), 20 R.F.L. 112; 52 D.L.R. (3d) 280 (Co. Ct. Winn.).

Re Schepull and Bekeschus and The Provincial Secretary, [1954] O.R. 67 (S.C.).

Reference re Constitution Act (U.K.), ss. 91, 92, [1991] 4 W.W.R. 193.

Ross v. *MacQueen*, [1948] 2 D.L.R. 536 (Alta. S.C.).

Ross v. *Registrar of Motor Vehicles*, [1975] 1 S.C.R. 5.

Scott v. *State* 39 Ga. 321 (1869).

Secretary, Department of Social Security v. *S.R.A.* (1993), 118 A.L.R. 467 (F.C.A.).

Smith v. *The Queen*, [1960] S.C.R. 776.

Sottomayor v. *De Barros* (1877), 3 Prob. Div. 1.

State v. *Jackson* 80 Mo. 175 (1883).

Teagle v. *Teagle*, [1952] 3 D.L.R. 843 (B.C.S.C.).

Tice v. *Tice*, [1937] O.R. 233, aff'd [1937] 2 D.L.R. 591 (C.A.).

Union Colliery Co. of British Columbia v. *Bryden*, [1899] A.C. 580 (P.C.).

Warrender v. *Warrender* (1835), 2 Cl. & F 531; 6 E.R. (H.L.) 1239.

Whitbread v. *Walley*, [1990] 3 S.C.R. 1273.

Windermere Watersport Inc. v. *Invermere (District)* [1989] B.C.J. no. 863 (C.A.) online: QL (CJ).

Books, Articles and Other Materials

H. M. Applebaum, *Miscegenation Statutes: A Constitutional and Social Problem*, (1964) 53 Geo. L.J. 49.

"Attorney-General's Statement on Same Sex Marriages", Office of Attorney General of British Columbia, issued May 26, 2000.

N. Bala, Program and Conference Papers, Domestic Partnerships Conference, Queen's University, sponsored in part by Law Commission of Canada, 21-23 October 1999.

G. Breitkreuz, "Breitkreuz renames Bill C-23 the *Death of Marriage Act*", Press Release, March 2, 2000.

British Columbia Law Institute, Report on Recognition of Spousal and Family Status, Executive Summary, <http://www.bcli.org>.

B. Cossman and B. Ryder. *Gay, Lesbian and Unmarried Heterosexual Couples and the Family Law Act: Accommodating a Diversity of Family Forms* (Ontario Law Reform Commission, 1993).

S. Fodden, and J. David Fine, "Annulment of Marriage for Impotence in the Common Law of Canada" (1973) 8 R.F.L. 129.

Gay & Lesbian Advocates & Defenders, "Vermont House Gives Final Approval to Civil Union Bill", Press Release, April 25, 2000.

Hansard, *House of Commons Debates* (June 8, 1999).

Hansard, *House of Commons Debates* (February 15, 2000).

Hansard, *Standing Committee on Justice and Human Rights* (February 29, 2000).

Hansard, *Standing Committee on Justice and Human Rights* (March 23, 2000).

P.W. Hogg, *Constitutional Law of Canada (1998 Student Edition)* (Toronto: Carswell, 1998).

P.W. Hogg, *Constitutional Law of Canada*, Looseleaf ed. (Toronto: Carswell, 1999) Vol. 1.

L. Katz, "The Scope of the Federal Legislative Authority in Relation to Marriage" (1975) 7 Ottawa L. Rev. 384.

Legislative Assembly, *Ontario Hansard* (27 October 1999).

Ottawa Citizen, "Vermont okays gay 'unions'", April 20, 2000, E8.

R. Wintemute, "Sexual Orientation Discrimination as Sex Discrimination: Same-Sex Couples and the Charter in *Mossop*, *Egan* and *Layland*" (1994) 39 McGill L.J. 429.